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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

THE LEITER MINERALS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General on behalf of the United States of America petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 3, 1964.

OPINIONS BELOW

The opinion of the district court (App., *infra*, p. 64; R. 634-648) is reported at 204 F.Supp. 560. The opinion of the court of appeals (App., *infra*, p. 78) is reported at 329 F.2d 85.[1]

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[1] We have also printed in the Appendix, *infra*, pp. 35-64, the opinion of the Louisiana Supreme Court in the abstention pro-

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1964 (App., *infra*, p. 97). A timely petition for rehearing was denied October 5, 1964 (App., *infra*, p. 98). On December 16, 1964, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including March 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Pursuant to the Migratory Bird Conservation Act, the United States acquired land in Louisiana for a

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ceedings, which is reported at 241 La. 915, 132 So.2d 845.

The other court opinions in the prior proceedings in the case, referred to at pages 7-8, *infra*, are as follows:

Opinion of the United States District Court for the Eastern District of Louisiana, June 22, 1954, enjoining the court proceedings, R. 403-418, 127 F.Supp. 439;

Opinion of the United States Court of Appeals for the Fifth Circuit, June 30, 1955, affirming the order granting injunction, 224 F.2d 381;

Opinion of this Court, January 14, 1957, affirming the order granting injunction but directing abstention pending interpretation by the Louisiana Supreme Court of the State Statute involved, R. 429-442, 352 U.S. 220;

Opinion of the Louisiana District Court for Plaquemines Parish in the action for declaratory judgment pending abstention. This opinion is unreported but is reproduced in the dissenting opinion of Justice Hamlin of the Louisiana Supreme Court, 241 La. 946, 132 So.2d 855;

Opinion of Court of Appeal of Louisiana (Fourth Circuit), January 3, 1961, in the action for declaratory judgment pending abstention, reversing decision of the Plaquemines Parish District Court, 126 So.2d 76.

wildlife refuge under a deed reserving the mineral rights to the grantor, but providing that such rights should vest in the United States at the end of a specified period unless prior to that time the grantor should discover and produce oil or gas in commercial quantities. The specified time expired without discovery or production by the grantor. The claim sustained below is that an intervening statute of Louisiana (Act 315 of 1940), passed after the date of the deed and providing that mineral rights reserved in land sales to the United States shall be "imprescriptible," had the effect of extending indefinitely the grantor's mineral reservation.

The question presented on these facts is whether the Louisiana statute, if applicable, can constitutionally be applied to defeat the government's valuable right to the minerals.[2]

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[2] Included subsidiary questions are:

(a) Whether Louisiana Act 315, as construed and applied by the court below, is invalid under the Supremacy Clause, the Contract Clause and the Fourteenth Amendment of the Federal Constitution.

(b) Whether Federal law, rather than State law, governs the property rights of the United States in lands acquired under the Migratory Bird Conservation Act.

(c) Whether the deed under which the United States acquired title, construed under State or Federal law, falls within the provisions of Louisiana Act 315 as construed by the Louisiana Supreme Court in the abstention proceedings in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Article I, Section 10, clause 1:

"No state shall * * * pass any * * * Law impairing the Obligation of Contracts, * * *."

Article VI, clause 2:

"This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Fourteenth Amendment, Section 1:

" * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Migratory Bird Conservation Act (16 U.S.C. 715):

The pertinent portions of this act are set forth in the Appendix, *infra*, pp. 29-33.

Louisiana Act No. 12 of 1892:

This act, consenting to the acquisition by the United States of land in Louisiana, is set forth in the Appendix, *infra*, pp. 33-34.

Louisiana Act No. 315 of 1940:

* * * *

Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or ex-

propriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.

STATEMENT

In March, 1935, the executors of the Estate of Joseph Leiter entered into a contract to sell to the United States some 8,711 acres of land in Plaquemines Parish, Louisiana, which had been devised to Thomas Leiter (R: 72). The lands were acquired by the United States for a wildlife refuge under the provisions of the Migratory Bird Conservation Act (16 U.S.C. 715, App., *infra*, pp. 29-33.). In 1938, Thomas Leiter adopted and ratified the 1935 contract and delivered a formal deed in identical terms to the United States (R. 139, 142).

Both the contract and the deed reserved mineral rights to Leiter until April 1, 1945, with various stipulations for the payment of royalties and extension of the mineral rights if oil and gas were produced in commercial quantities. But the contract and deed also provided:

> * * * at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the

> operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.[3]

Neither Leiter nor any successor in interest ever explored for or produced any minerals from the land in question (R. 404).

In 1949, after the mineral rights had vested in the United States under the terms of the contract and deed, the United States issued oil and gas leases on the property (R. 155-236), and, in the same year, its lessees entered into operating agreements with The California Company (R. 343-397). In 1950, oil was discovered (R. 339). By May of 1954, eighty wells were producing (R. 337).[4]

In August, 1953, after a substantial oil field had been developed, respondent (the incorporated successor of Thomas Leiter's interests) brought suit in the Louisiana District Court for Plaquemines Parish against The California Company and the lessees of the United States to be declared the owner of the mineral rights. The claim was founded on a Louisiana statute enacted in 1940 (Act 315 of 1940, *supra*, pp. 4-5) which, it was contended, had the effect of extending the Leiter mineral interest indefinitely and converting it into an unconditional right to extract oil and gas in perpetuity. The law in question provides that when land is acquired by the United States in

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[3] R. 142, 151-152. The full text of the reservation is reproduced in the Appendix, *infra*, pp. 102-103.

[4] At the present time, there are 100 producing wells.

Louisiana, and minerals are reserved, "said rights so reserved * * * shall be imprescriptible"—contrary to the general Louisiana rule that a right to minerals is lost by prescription if it is not exercised for ten years. Respondent's theory was that the stipulations in the deed of sale with respect to the duration of the mineral reservation were superseded by the later statute.

At this point, the United States, joining respondent and other interested parties as defendants, brought suit in the United States District Court for the Eastern District of Louisiana to quiet its title to the mineral rights and requested an injunction against respondent's prosecution of the action in the State court, to which the United States was not a party (R. 1). The district court issued the injunction (R. 418) and the Court of Appeals for the Fifth Circuit affirmed (R. 427). This Court, on certiorari, noting the government's contention that the State statute would be unconstitutional if construed to apply to the government's contract, ordered the injunction modified "to permit an interpretation of the state statute to be sought * * * in the state court" (352 U.S. 230). The Court pointed out (*id.* at 229-230):

> It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

Subsequently the Supreme Court of Louisiana construed the State statute to apply retroactively and

to effect "contractual prescription" [5] as well as statutory prescription (App., *infra*, p. 49). It summarized its advisory opinion as follows (App., *infra*, pp. 51-52).

> First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as [1] not establishing a servitude for a fixed, definite and certain time, and if it is decided [2] that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional. The interpretation of the contract is for the United States courts.

The federal suit was then reactivated. The district court (Judge J. Skelly Wright) held that it was unnecessary to decide the serious constitutional questions posed by the decision of the Louisiana Supreme Court [6] because the contract between Leiter and the

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[5] For a brief statement of the Louisiana doctrine of "prescription" as applied to mineral rights, see *infra*, p. 13, n. 12.

[6] The court said (R. 638-639, App., *infra*, pp. 67-69):

"That opinion, however, does not, as it could not, resolve serious doubts concerning the constitutionality of the Louisiana Act. There is not only the obvious bar of the Contract Clause to any impairment of the obligation of contracts. U.S. Const., Art. 1, § 10, cl. 1. Also implicit in any application of the statute here are questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. If

United States—independently construed by the federal court as was its duty (R. 644; App., *infra*, p. 74, note 25)—"clearly" provided neither for an indefinite term nor for "contractual prescription." Hence it concluded that Act 315, as construed by the State court, did not govern the agreement and Leiter's mineral interest had expired in 1945 or 1948, at the latest[6] (R. 648, App., *infra*, p. 77).

The court of appeals reversed by a divided vote (App., *infra*, pp. 95-96). It rejected the government's contention that the rights of the United States were controlled by federal law and held that the laws of Louisiana governed the rights of the United States as well as the construction of its contract. It concluded that under State law the contract must be construed to provide for an indefinite term and for a "contractual prescription."[7] Accordingly, the court

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Act 315 is held to work a forfeiture of substantial mineral rights owned by the United States, is this deprivation of property reasonably necessary in the service of a legitimate governmental objective? And, in any event, does this discrimination directed against the federal government and its lessees result from a reasonable classification? The last question has a sharper edge when we learn that Louisiana once dealt itself the same treatment as it now reserves for the United States alone. But, fortunately, these and other federal issues can be avoided if Act 315 of 1940 is inapplicable in the premises. And that is the conclusion to which we are led when we attempt to superimpose the statute, elucidated as it has been by the Louisiana Supreme Court, on the present facts, as they appear [footnotes omitted]."

[6] See note 17, *infra*, p. 20.

[7] In its advisory opinion the Louisiana Supreme Court noted that the construction of the contract, as distinguished from the construction of the Louisiana statute, was outside the scope of the matters referred to the State courts

held, Louisiana Act 315 had nullified the provisions in the contract providing for the vesting of title in the United States (App., *infra*, pp. 94-95). As to the government's contention that Act 315, as so construed, unconstitutionally impaired the obligations of its contract, the court said that its prior decision in *United States* v. *Nebo Oil Co.*, 190 F.2d 1003, made it "unnecessary further to labor" this point.[8]

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS INVOLVED ARE IMPORTANT

1. The value of the minerals in suit is estimated at more than $350,000,000. To date, some $150,000,000 worth of oil has been produced and the United States has received in royalties approximately $19,000,000 under the leases involved in this particular case. One fourth of this amount has been distributed to Plaquemines Parish for the benefit of its public schools and roads in accordance with the provi-

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in the abstention proceedings, and held that the construction of the contract was a question for the United States courts (*supra*, p. 8). Nevertheless, the court below, in construing the contract "in accordance with State law" (App., *infra*, p. 89), relied on intimations in the opinion of the Louisiana Supreme Court which the court below thought indicated the manner in which that court would have construed the contract had the question been before it (App., *infra*, pp. 89-91). The curious result—in this abstention case—is that the court of appeals has held itself bound by intimations in dicta of the State court as to the meaning of the contract, although that court was enjoined by the federal court from deciding the question and repeatedly disclaimed its intention or power to do so.

[8] For a discussion of the *Nebo* case, see pages 21-22, *infra*.

sions of Section 715s of the Migratory Bird Conservation Act (App., *infra*, p. 33). Engineers estimate that less than one half of the oil and gas in the field has been produced. Accordingly, this case, alone, is of great importance to the United States and the citizens of Louisiana.

But the importance of the case does not end here. A survey in 1955 showed that the United States owned 1,032,558 acres of rural land in Louisiana.[9] Records are not available as to the extent to which mineral reservations were contained in the deeds or condemnation judgments by which these lands were acquired in Louisiana. However, they are known to be numerous. There are outstanding some 400 oil and gas leases issued by the United States covering 300,000 acres of these acquired lands.[10] The Bureau of Land Management of the Department of the Interior estimates that at least half of the 300,000 acres were acquired subject to a mineral reservation identical or similar to the Leiter reservation, the main difference being whether the initial period was for ten years or twenty-five years.[11] The 300,000-acre figure does not include substantial additional acreage on which leases have not been issued up to the present time but on which minerals were reserved on similar terms. The mineral rights of the United States in all of these lands may be adversely affected by the decision below.

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[9] S.Doc. 100, 84th Cong., 2d Sess. 1956, p. 58.

[10] These leases are issued under the Mineral Leasing Act for Acquired Lands of August 7, 1947, 30 U.S.C. 351 *et seq.*

[11] See App. *infra*, p. 104.

2. The effect of the decision below is not confined to Louisiana or to mineral rights. The United States has acquired approximately 1,425,000 acres of land under the Migratory Bird Conservation Act in 41 States. Many additional millions of acres have been acquired in all of the States of the Union for national forests under the Weeks Law (Act of March 1, 1911, 36 Stat. 961), which closely parallels the Migratory Bird Conservation Act. The ruling that interests thus acquired are to be measured in accordance with the vagaries of local property laws may adversely affect the title of the United States to many of such lands.

3. Beyond its immediate effect on lands already acquired by the United States, the decision is disturbing as a precedent. The court below held that, absent an explicit congressional declaration to the contrary in the enabling legislation, each State is free to impose what restrictions it will on the manner and extent of land acquisitions by the national government. If the invitation were followed, all manner of crippling restrictions on federal projects might result, and, in any event, the wide disparity in local rules would create serious practical problems. *Cf. United States* v. *Yazell*, No. 575, this Term, certiorari granted January 18, 1965. Equally disquieting is the proposition approved by the court of appeals that States may fashion their land law in a way that discriminates uniquely against the United States.

Finally, the decision below threatens the security of substantial federal land interests by holding that the constitutional bar against laws impairing the ob-

ligation of contracts does not prevent the total abrogation of valuable rights previously acquired by the United States through contractual stipulation.

In these several respects, as we elaborate below, the decision is destructive of settled principles enunciated by this Court and by other courts of appeals.

II. THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS

The serious constitutional questions presented here arise because of (1) the surprising decision of the Louisiana Supreme Court that the Louisiana statute of 1940 applies to some *contractual* provisions fixing the duration of mineral interests and (2) the determination below that the Leiter deed reserved the mineral interests in suit for a period of "contractual prescription" which was indefinitely extended by the 1940 statute.[12] The former ruling is, of course, binding as a question of State law. The later holding presents a threshold question which we will urge was rightly decided by the district court for the reasons stated in Judge Wright's opinion and adopted by Cir-

[12] In Louisiana, there can be no separate estate in minerals, apart from ownership of the surface. The most that may be granted (or reserved) is a right to explore for and extract the minerals (a so-called "servitude"), which expires automatically (by the force of "prescription") if it is not exercised for ten years. Private parties cannot validly stipulate that a mineral interest shall survive a decade of inactivity. The effect of Act 315 of 1940 is to suspend the operation of the law of prescription when the landowner sells to the United States and reserves the minerals; his right to extract the minerals is made "imprescriptible."

cuit Judge Gewin in his dissenting opinion on appeal.[13] The questions requiring certiorari, however, as important matters of principle quite apart from the magnitude of the interests involved, are the constitutional issues flowing from the threshold decision. In our view the decision below offends the Constitution for three independent reasons. First, the decision violates the Supremacy Clause [13a] by subjecting federal acquisition of land by purchase to the idiosyncrasies of local land law—even when applied retroactively—without regard to the effect upon the federal program authorized by Congress or the absence of a State interest in the subject matter. Second, the Louisiana statute, as applied, impairs the obligation of a contract in violation of Article I, Sec. 10. Third, the statute singles out the United States for hostile discrimination in the acquisition of interests in land.

1. THE DECISION BELOW VIOLATES THE SUPREMACY CLAUSE BY SUBJECTING FEDERAL ACQUISITIONS OF LAND TO THE IDIOSYNCRASIES OF LOCAL LAND LAW.

The land in this case was acquired pursuant to the Migratory Bird Conservation Act, legislation enacted in furtherance of a national program for the protection of wildlife, implementing in part the treaty between the United States and Great Britain. The authority of the United States to enter into the contract of purchase and to acquire rights under the deed "had

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[13] In view of the magnitude of the interests involved, it is noteworthy that, below, each disposition of the threshold question won the vote of one circuit judge and one district judge.

[13a] Substantially the same arguments might be made under the Property Clause, Art. IV, Sec. 3, cl. 2.

its origin in the Constitution and the statutes of the United States" (*Clearfield Trust Co.* v. *U.S.*, 318 U.S. 363, 366). It was in no way dependent upon the laws of Louisiana, once the State had given its general consent to a purchase of this kind, as it did as long ago as 1892 (App., *infra*, pp. 33-34).

The court below held that the effect of the deed was nevertheless dependent upon local law, not merely as it stood at the time of the transaction, but as altered by a statute enacted after the deed was executed: "State law," the court said, "must govern in the absence of a federal statute making federal law applicable" (App., *infra*, p. 85).

That ruling conflicts in principle with *United States* v. *93,970 Acres*, 360 U.S. 328, where this Court held that the right of the United States to terminate a lease under a provision thereof, despite its entry pursuant to a taking by eminent domain, was not governed by State law making the taking an election of remedies. The Court said (at pp. 332-333):

> We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make State laws applicable. * * *

For the same reason the decision conflicts with *State Box Company* v. *United States*, 321 F. 2d 640 (C.A. 9), albeit the United States was there the grantor. Nor can the holding below, that State law governs the effect of a grant of lands to the United States, be reconciled with the line of decisions in other circuits holding that estates and interests cre-

ated by declarations of taking are to be determined by federal law. See, *e.g.*, *Bumpus* v. *United States*, 325 F. 2d 264 (C.A. 10); *United States* v. *Certain Interests In Property, Etc.*, 271 F. 2d 379 (C.A. 7); *United States* v. *Pinson*, 331 F. 2d 759 (C.A. 5).[14] It would be expensive for the government and unduly inconvenient to private citizens to force the United States to resort to judicial proceedings to obtain land the owner was willing to convey merely in order to escape the vagaries of State determinations concerning the effect of a voluntary conveyance.

There is no independent basis for the conclusion of the court below that, in this instance, Congress "merely authorized the contract" by which the United States acquired its property, leaving the State wholly

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[14] The sole authority relied upon by the court below for its holding that State law measures the quantum of the interests acquired by the United States is *United States* v. *Certain Property, Etc.*, 306 F. 2d 439 (C.A. 2). But, whatever the merits of that decision—which is not yet final (a second appeal after remand is now pending)—it does not support the ruling here. In *Certain Property*, the court applied State law to regulate the way in which the United States could achieve legal results that were left open to it by the State; here, State law has been applied to determine what legal results the United States is permitted and what results it is not permitted to achieve, regardless of the necessities of the federal program in question. This Court, in *United States* v. *Burnison*, 339 U.S. 87, 93 (n. 14), in sustaining a State statute prohibiting testamentary gifts to the United States, pointed out:

> * * * our determination does not affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state. * * *

free to determine what interest could be secured and measuring the interest actually obtained by reference to State law. No intent to reverse the usual rule and subordinate federal acquisitions to State law can be derived from the provisions of the Migratory Bird Conservation Act.

To be sure, as the court below noted (App., *infra*, p. 31), Section 715(f) of the Act in effect confines the federal program to States which "have consented by law to the acquisition by the United States of lands in that State." But there is no warrant for reading that very general provision as subjecting the United States to all the peculiarities of local land law. The Congressional assumption is that some States may have a confirmed public policy of excluding altogether the federal government as a purchaser of land, for any purpose, and the Act determines to respect such a policy. The other part of the assumption, however, is that many States have enacted statutes generally consenting to land acquisitions by the United States. That is the situation of most of the States, including Louisiana which in 1892 expressly authorized federal land purchases for all "purposes of the government of the United States" (App., *infra*, pp. 33-34). No Louisiana court has intimated that the statute of 1940 here invoked effects a partial repeal or qualification of that consent. But, in any event, the Migratory Bird Act does not contemplate partial or conditioned consents. It is one thing to respect a firm "No Trespass" sign and stay out altogether; it is quite another to enter on invitation and to be agreeable to being told exactly what one may and may not do. Every

indication is that Congress was unwilling to go so far in deferring to local law.

The plan of the Migratory Bird Conservation Act betrays no preoccupation with the peculiarities of local land law. No provision is made for the delays and detours that State rules might impose. On the contrary, the assumption is that the administrators of the federal program have full power to acquire what interests they need and to concede such compatible rights in others as they may deem expedient. Of course that discretion is especially important to permit a practical adjustment of the sharply competing interests of the owner of land with a speculative value for oil and gas (who expects either an increased purchase price or the opportunity to exploit the minerals) and of the United States (which seeks to avoid payment of large sums for speculative mineral rights, and at the same time, is anxious to know, as soon as possible, before finally fixing the boundaries of the refuge and making substantial expenditures, whether mineral operations will be conducted by others or whether production, if any, will be under its control). That is what was done here.[15] There is no warrant

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[15] The Department of the Interior memorandum recommending the Leiter purchase (App., *infra*, pp. 99-101) confirms that the extent and value of the land as a wild-life refuge, under the particular mineral reservation agreed upon, were carefully considered in connection with the purchase of the land. The memorandum points out that if oil and gas should be discovered and produced under the reservation, and the lands thereby become "seriously impaired through oil pollution," the United States would recover the purchase price under the provision for repayment through royalties—and

for the decision below which—by subjecting the national program to the peculiarities of Louisiana law—confines the United States to a choice between the high cost of an outright purchase of land or a purchase subject to the reservation of mineral rights in perpetuity—closing to the government the usual and advantageous opportunity (available to all others) of acquiring surface rights to needed land while reserving minerals to the vendor for a specified term and thereafter as long as oil and gas are produced in commercial quantities.[16]

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thus be able to acquire substitute lands. On the other hand, the memorandum states that protracted prospecting in the area had disclosed no evidence of oil and the "premise" was that the reservation would expire within ten years and title vest in the United States.

[16] That form of reservation is obviously best suited to accommodate the interest of the seller (or his lessee)—who wants assurance that he will reap the full benefits of costly exploration if he discovers oil in paying quantities—and of the buyer—who is willing to concede a mineral reservation to reduce purchase costs, but does not want his land indefinitely clouded by the uncertain prospect of mineral exploration at some unknown future date. It is the pattern of mineral leases granted by the United States on federal lands. See 30 U.S.C. 226 (Mineral Leasing Act of 1920) which is equally applicable to acquired lands. 30 U.S.C. 352 (Mineral Leasing Act for Acquired Lands). When the mineral reservation bears on lands set aside for wildlife refuge purposes, the importance of circumscribing oil production activities within reasonable time limits is all the greater. See the restrictive regulations governing oil and gas leases on wildlife refuges at the time the present leases on the Leiter lands were issued in 43 C.F.R. (1954 ed.) 192.9, 12 F.R. 7334. Today, the regulations bar all leasing of refuge lands, except in the case of drainage. 43 C.F.R. (April 1. 1964 Supp.) 3120.3-3, 23 F.R. 227. See *Udall* v. *Tallman*, No. 34, this Term, decided March 1, 1965.

2. THE LOUISIANA STATUTE, AS APPLIED BELOW, IMPAIRS THE OBLIGATION OF THE GOVERNMENT'S CONTRACT.

The deed in this case is unambiguous: for a stated consideration, Thomas Leiter conveyed the property in suit to the United States (R. 142), retaining for a time a right to explore for and extract the minerals. Under that reservation (R. 151; App., *infra*, pp. 102-103) Leiter's mineral rights would expire in ten years,[17] unless mineral operations meeting certain stated requirements had been conducted during the last three years of the primary term. It is unquestioned that neither Thomas Leiter, Leiter Minerals, Inc., nor any other person acting through or under them, has ever conducted any mineral operations of any kind on the land in question (R. 404). Accordingly, no extension or renewal of the mineral reservation occurred and Leiter's rights irrevocably lapsed, at the latest, in 1948. The contract spelled out the result (R. 152; App., *infra*, p. 103):

> * * * at the termination of the ten (10) year period of reservation, if not extended, * * *, the

[17] There is an ambiguity in the deed with respect to the termination date of the mineral reservation, arising out of the fact that the contract of sale was made in 1935, whereas the deed—repeating the contract's exact words—was executed in 1938. The deed sets April 1, 1945, as the expiration date of the primary term; later in the deed, reference is made to the "ten (10) year period of reservation." These two methods of defining the term are in harmony in the 1935 contract. However, in 1938, when the reservation was copied into the deed, a "ten (10) year period of reservation" would not elapse until 1948. As it happens, the discrepancy is unimportant since mineral operations were not commenced by anyone until after the expiration of the ten-year period in 1948. See opinion of the district court (App., *infra*, p. 74).

> right to mine shall terminate, and complete fee in the land become vested in the United States.

There can be no quibble about the nature or value of the right of reversion stipulated in favor of the United States. It has a double aspect: not only would the right to the minerals fully vest in the government if the seller did not promptly and successfully begin mining, but, equally important, the United States would then be secure against any disturbance in its exclusive possession of the refuge. Those stipulations were bargained for. They were agreed to in 1935 and finally ratified in 1938. Yet, the court below ruled that a Louisiana statute, enacted in 1940, could wholly erase the provisions from the deed without "impairing" the contract. However one reads the Contract Clause, that result cannot be squared with the constitutional guarantee. See *Home Bldg. & L. Assn.* v. *Blaisdell*, 290 U.S. 398, 430-431; *City of El Paso* v. *Simmons*, No. 38, 1964 Term, decided January 18, 1965.

In reaching its result, the court below (like the Louisiana Supreme Court) relied solely on its prior decision in *United States* v. *Nebo Oil Co.*, 190 F.2d 1003 (C.A. 5). But, assuming the correctness of that ruling, *Nebo* plainly does not govern the present case. There the United States had acquired lands for a forest reserve in Louisiana under a deed which conveyed to the United States only the surface rights, subject to a prior disposition of all mineral rights. The question was whether the government acquired the mineral rights, not by virtue of any stipulation in its contract, but by operation of the Louisiana ten-

year prescription statute. The court held (p. 1010) that the government's "hope" of acquiring title to the mineral rights under the law of prescription was a mere "expectation of a servitude lapsed for nonuser" —not a contract right—which could be modified at the will of the State. Accordingly, there, Act 315 of 1940 was held effective to bar a reversion of the minerals to the United States.[18] The situation here is fundamentally different. In the present case, the government's right—whatever the correct characterization, "contractual prescription" or not—is bottomed squarely on an express contract and depends in no degree upon the law of Louisiana. It is a property right of great value, bought and bargained for, and secured by a private contract. Cf. *Hickman* v. *United States*, 135 F. Supp. 919 (W.D. La.), opinion on rehearing, 140 F. Supp. 759.

One other point requires mention. In the court below, respondent contended that the Contract Clause does not enter into this case because the Leiter deed was executed after the enactment of an earlier statute

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[18] The court pointed out that, there, application of Act 315 of 1940 *enforced*, rather than impaired, the express terms of the government's contract:

> All that Bodcaw [the government's grantor] had which it could sell to the United States was the timber land itself [the surface rights]. That was the obligation of the contract and it remains unimpaired [190 F.2d 1010].

The district court emphasized the same point:

> Under such circumstances, it is impossible to contend that Act No. 315 of 1940 impairs the obligations of contract. On the contrary, it enforces the contractual obligations of the parties as they understood them at the time the sales were made [90 F. Supp. 92].

of Louisiana, Act 151 of 1938, which provided that "prescription shall not run" against mineral reservations in certain acquisitions of land by the United States or by the State of Louisiana and its subdivisions. In the present posture of the case, however, that contention is foreclosed.

Respondent's complaint in the State court relied solely on Act 315 of 1940 (R. 265). In the subsequent proceedings in the federal courts and through this Court, Act 315 alone was considered and this Court remanded for declaratory judgment proceedings to construe that Act (352 U.S. at 221, 226, 229). The only question presented to the Louisiana Supreme Court in the referenced proceedings was the construction of Act 315 of 1940 (R. 497, 500). Act 151 of 1938 was first mentioned in an *amicus* brief in the Louisiana Court of Appeals. That court did not pass upon it, and the Supreme Court of Louisiana did not mention it. While the federal courts below adverted to the question, neither of them decided it. The court of appeals expressly bottomed its holding rejecting the Contract Clause claim on the assumption that the change in local law had occurred after an effective contract was executed (App., *infra*, p. 95).

In addition, the argument is unpersuasive. The 1938 Act, which is copied in the margin,[19] differs sub-

[19] "* * * That when real estate is acquired by the United States of America, the State of Louisiana, or any of its subdivisions, from any person, firm or corporation for use in any public work and/or improvement, and, by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run against such reservation of said oil, gas and/or other minerals or royalties."

stantially from Act 315 of 1940, and it is most unlikely, to say the least, that it would be construed to apply to *contractual* stipulations as to term, even if characterized as "contractual prescription." [20] Moreover, the contract under which the United States acquired title to these lands was entered into with the executors of Leiter's decedent in 1935, long before the enactment of Act 151 of 1938. Immediately thereafter, in January, 1936, the United States took possession and by Executive Order established the Delta Migratory Waterfowl Refuge (R. 340-341). In May, 1938, still prior to the passage of Act 151, Leiter confirmed the 1935 contract in a petition filed in an inheritance tax proceeding in the state court (R. 115-116). On October 24, 1938, shortly after the enactment of Act 151, Leiter formally ratified the 1935 contract (R. 139-140) and pursuant thereto signed and delivered the deed in the exact language of the contract. Whether, under these facts, "the Leiters were then merely performing an inescapable duty to execute a deed, all the terms of which had been settled in 1935, in which case the 1938 Act might itself be viewed as working an impairment of the ob-

[20] Act 315 applies only to the United States; Act 151 includes the State of Louisiana and its subdivisions. Act 151 of 1938 uses the words, "prescription shall not run"; Act 315, the broader phrase "shall be imprescriptible." The words "prescription shall not run" are obviously more susceptible to a normal construction applying them only to statutory prescription, and it seems hardly likely that the Louisiana Supreme Court would construe those words in Act 151 to apply to deeds under which the State of Louisiana and its subdivisions have acquired title.

ligation of contracts" (opinion of the district court, App. *infra*, p. 68, fn. 15), has not been decided.

1. THE LOUISIANA STATUTE UNCONSTITUTIONALLY SINGLES OUT THE UNITED STATES FOR HOSTILE DISCRIMINATION IN THE ACQUISITION OF INTERESTS IN LAND.

The Louisiana statute singles out the United States alone to deprive it of property and of the right to contract. District Judge Wright noted the serious questions thus posed under the due process and equal protection clauses of the Fourteenth Amendment (note 6, *supra*, pp. 8-9). Neither this Court nor any other federal appellate court appears to have passed on the question whether the United States is a "person" within the meaning of the Fourteenth Amendment.[21] This is not surprising since the same protection the Fourteenth Amendment gives is ordinarily provided in the overriding principle of federal-State

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[21] In *United States* v. *Burnison*, 339 U.S. 87, this Court rejected a claim of the government under the equal protection clause, saying (p. 95):

> * * * although we should make the somewhat dubious assumption that the United States must receive equal protection under the Fourteenth Amendment, there is no constitutional violation.

The district court in *United States* v. *Nebo Oil Co.*, 90 F. Supp. 73, 95 (W.D. La.), held that the United States is not a "person" within the meaning of the Fourteenth Amendment. Dicta to the same effect appear in the opinion of the Court of Appeals for the Fifth Circuit in *United States* v. *City of Jackson, Miss.*, 318 F. 2d 1, 8, and in the opinion of Judge Mize in *United States* v. *Biloxi Municipal School District*, 219 F. Supp. 691 (S.D. Miss.), affirmed, 326 F. 2d 237 (C.A. 5). Apparently to the contrary, see *United States* v. *Standard Oil Co.*, 21 F. Supp. 645, 659 (S.D. Cal.), affirmed, 107 F. 2d 402, 417-419 (C.A. 9).

relationships.[22] No reason appears, however, why the United States is not entitled to the protection of the Amendment, and this has been the government's consistent position.[23] Tested under the Fourteenth Amendment the statute here cannot stand, even on the assumption that the police power of the state extends to regulation of the United States.

The Louisiana Supreme Court suggested three "objects and purposes for the enactment of Act 315 of

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[22] Since *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, it has been settled that:

> * * * the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

And see: *California Comm'n* v. *United States*, 355 U.S. 534. The "police power of a State does not extend to the United States, its property or transactions" (*United States* v. *Mayo*, 47 F. Supp. 552, 557 (N.D. Fla.)); the "activities of the Federal Government are free from regulation by any state" (*Mayo et al.* v. *United States*, 319 U.S. 441, 445—affirming the decision just quoted); "a State is without power by reason of the supremacy clause to provide the conditions on which the Federal Government will effectuate its policies" (*United States* v. *Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293).

And it is established that the States cannot discriminate against federal interests. *Moses Lake Homes* v. *Grant County*, 365 U.S. 744; *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376; *McKnett* v. *St. Louis & San Francisco Ry.*, 292 U.S. 230.

[23] See the *Burnison* and *Standard Oil* cases cited in note 21, *supra*.

1940": (1) to permit the United States to acquire surface rights without being required to pay for mineral rights which might, if reserved, prescribe under the Louisiana law, (2) to safeguard the state's revenues, and (3) to keep mineral rights in Louisiana lands subject to State conservation measures (App., *infra*; pp. 43-46). No one of these three purported objects supports the "classification" of the United States as the only subject of the statute, or suggests any reasonable justification for the deprivation of its property. If the Louisiana Supreme Court had given Act 315 its normal construction and applied it to involuntary statutory prescription, its first point would be quite sound. But as it applied the statute to remove one possible restriction, it construed it to add a further limitation even more onerous. The fact that a statute has one beneficial aspect does not save its unconstitutional application to other situations.

The other suggested objects—revenue and conservation—are likewise specious. The United States is not prohibited from acquiring mineral rights, but only from acquiring them under a contract permitting an initial period for exploration and production —a type of contract designed to encourage exploitation of the minerals by the grantors, who are liable to taxation. Finally, it is well known that federal laws and regulations have always strictly enforced conservation measures.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
Attorney.

MARCH, 1965.

APPENDIX

ADDITIONAL STATUTES INVOLVED

Migratory Bird Conservation Act, 16 U.S.C. 715:

§ 715a. A commission to be known as the Migratory Bird Conservation Commission, consisting of the Secretary of the Interior, as chairman, the Secretary of Commerce, the Secretary of Agriculture and two Members of the Senate, to be selected by the President of the Senate, and two Members of the House of Representatives to be selected by the Speaker, is created and authorized to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title, and to fix the price or prices at which such area may be purchased or rented; and no purchase or rental shall be made of any such area until it has been duly approved for purchase or rental by said commission. * * *

§715c. The Secretary of the Interior shall recommend no area for purchase or rental under the terms of sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title except such as he shall determine is necessary for the conservation of migratory game birds.

§ 715d. The Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission, at the price or prices fixed by said commission, and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for

such purposes, and to pay the purchase or rental price and expenses incident to the location, examination, and survey of such areas and the acquisition of title thereto, including options when deemed necessary by the Secretary of the Interior from moneys to be appropriated hereunder by Congress from time to time: * * *

§ 715d-1. When the public interests will be benefited thereby the Secretary of the Interior is authorized, in his discretion, to accept on behalf of the United States title to any land which he deems chiefly valuable for wildlife refuges, and in exchange therefor to convey by deed on behalf of the United States an equal value of lands acquired by him for like purposes, or he may authorize the grantor to cut and remove from such lands an equal value of timber, hay, or other products, or to otherwise use said lands, when compatible with the protection of the wildlife thereon, the values in each case to be determined by said Secretary. Timber or other products so granted shall be cut and removed, and other uses exercised, under the laws and regulations applicable to such refuges and under the direction of the Secretary of the Interior and under such supervision and restrictions as he may prescribe. * * *

§715e. The Secretary of the Interior may do all things and make all expenditures necessary to secure the safe title in the United States to the areas which may be acquired under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title, but no payment shall be made for any such areas until the title thereto shall be satisfactory to the Attorney General, but the acquisition of such areas by the United States shall in no case

be defeated because of rights-of-way, easements, and reservations which from their nature will in the opinion of the Secretary of the Interior in no manner interfere with the use of the areas so encumbered for the purposes of said sections, but such rights-of-way, easements, and reservations retained by the grantor or lessor from whom the United States receives title under said sections or any other Act for the acquisition by the Secretary of the Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of the Interior for the occupation, use, operation, protection, and administration of such areas as inviolate sanctuaries for migratory birds or as refuges for wildlife; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time.

§ 715f. No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

§ 715g. The jurisdiction of the State, both civil and criminal, over persons upon areas acquired under sections 715-715d, 715e, 715f-715k and 715*l*-715r of this title shall not be affected or changed by reason of their acquisition and ad-

ministration by the United States as migratory-bird reservations, except so far as the punishment of offenses against the United States is concerned.

§715i. No person shall knowingly disturb, injure, or destroy any notice, signboard, fence, building, ditch, dam, dike embankment, flume, spillway, or other improvement or property of the United States on any area acquired under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title, or cut, burn, or destroy any timber, grass, or other natural growth, on said area or on any area of the United States which heretofore has been or which hereafter may be set apart or reserved for the use of the Department of the Interior as a game refuge or as a preserve or reservation and breeding ground for native birds, under any law, proclamation, or Executive order, or occupy or use any part thereof, or enter thereon for any purpose, except in accordance with regulations of the Secretary of the Interior; * * *

§ 715k. For the acquisition, including the location, examination, and survey, of suitable areas of land, water, or land and water, for use as migratory bird reservations, and necessary expenses incident thereto, and for the administration, maintenance, and development of such areas and other preserves, reservations, or breeding grounds frequented by migratory game birds and under the administration of the Secretary of the Interior, including the construction of dams, dikes, ditches, flumes, spillways, buildings, and other necessary improvements, and for the elimination of the loss of migratory birds from alkali poisoning, oil pollution of waters, or other

causes, for cooperation with local authorities in wildlife conservation, for investigations and publications relating to North American birds, for personal services, printing, engraving, and issuance of circulars, posters, and other necessary matter and for the enforcement of the provisions of sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title, there are authorized to be appropriated, * * *

§ 715s. Twenty-five per centum of all money received during each fiscal year from the sale or other disposition of surplus wildlife, or of timber, hay, grass, or other spontaneous products of the soil, shell, sand, or gravel, and from other privileges on refuges established under sections 715-715d, 715e, 715f-715k, and 715*l*-715r of this title, * * * shall be paid at the end of such year by the Secretary of the Treasury to the county or counties in which such refuge is situated, to be expended for the benefit of the public schools and roads in the county or counties in which such refuge is situated: * * *

Act No. 12, Louisiana Statutes of 1892:

AN ACT

To cede jurisdiction to the United States over certain land and for the purchase and condemnation thereof.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Louisiana, not already in use for public pur-

poses, required for custom houses, court houses, arsenals, national cemeteries, or for other purposes of the government of the United States.

Sec. 2. Be is further enacted, etc., That the United States may enter upon and occupy any land which may have been, or may be purchased or condemned, or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes, except the administration of the criminal laws of said State, and the service of civil process of said State therein, and shall hold the same exempt from all State, parochial, municipal, or other taxation.

Approved June 20, 1892.

LOUISIANA SUPREME COURT OPINION

LEITER MINERALS, INC.

v.

CALIFORNIA CO., Allen L. Lobrano and Mrs. Ethel M. Fontennelle Lobrano, Individually and as Natural Tutrix of Her Minor Children, Robert Leo Lobrano and Karen Katherine Lobrano.

No. 45527.

Supreme Court of Louisiana.
June 29, 1961.

Rehearing Denied Oct. 4, 1961.

HAWTHORNE, Justice.

On December 21, 1938, Thomas Leiter sold to the United States of America a tract of land in Plaquemines Parish, Louisiana, containing 8,711 acres more or less, for a recited consideration of $25,000.[1] In this act of sale there is the following mineral reservation:

"The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oils, gas or other valuable min-

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[1] This tract was acquired for use as a wild life refuge. See United States v. Leiter Minerals, D.C., 127 F.Supp. 439, 440. It is presumably part of the "Delta Migratory Water Fowl Refuge", which, from an official map of the State of Louisiana in the Department of Public Works, appears to encompass more than 50,000 acres.

erals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000, being the purchase price paid by said United States of America for the aforedescribed properties.

"Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

"Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

"Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

"The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above set forth, remain vested in the vendors."

Approximately 18 months after the date of the deed containing this mineral reservation, the Louisiana Legislature of 1940 adopted Act 315, now R.S. 9:5806, which reads in part as follows:

"Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

Neither Thomas Leiter nor his successors in title have exercised the rights reserved in the 1938 deed to the government. In March, 1949, the United States granted to Frank J. and Allen L. Lobrano oil, gas, and mineral leases covering portions of the property described in its deed of acquisition. Under these leases the California Company has developed the property, and as of February, 1958, there were more than 80 wells on this land producing over 7,500 barrels of oil per day. From this production the United States has been paid royalties of more than $3,500,000.

For an understanding of the problem before us it is necessary to outline the history of the litigation that gave rise to this declaratory judgment suit with which we are here concerned.

In 1953 Leiter Minerals, Inc., instituted a petitory action in the district court for Plaquemines Parish, Louisiana, to have itself declared owner of the mineral rights under the tract of land sold to the United States in 1938 by Thomas Leiter, the corporation's predecessor in title. Named as defendants were the California Company and Lobrano in their capacity as lessees of the United States government; the United States was not a party to the suit. While Leiter's suit was pending in the Louisiana court, the United States instituted an action in the United States District Court for the Eastern District of Louisiana, asserting its title to these mineral rights and seeking an injunction to restrain Leiter Minerals, Inc., plaintiff in the suit in the state court, from litigating its claim in that court. See United States v. Leiter Minerals, Inc. et al., D.C., 127 F.Supp. 439. On appeal the United States Fifth Circuit Court of Appeals concluded that the federal district court was vested with exclusive jurisdiction to determine title to the mineral rights claimed by Leiter, and that the United States district judge was right in causing a preliminary injunction to issue. See 224 F.2d 381.

The United States Supreme Court, having granted certiorari, held that the United States district court properly exercised its jurisdiction to entertain the suit filed there, and that the granting of the preliminary injunction by that court was proper. See Leiter Minerals, Inc., v. United States, 352 U.S. 220, 77 S.Ct. 287, 292, 1 L.Ed.2d 267. The Supreme Court, however, modified the judgment of the Court of Appeals to permit an interpretation of Louisiana Act 315 of 1940 by the state court, saying:

"The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to this situation, it would impair the obligation of the Government's contract. Petitioner disagrees. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are or may be relevant. Before attempting to answer them and to decide their relation to the issue in the case, *we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court.* The Louisiana declaratory judgment procedure appears available to secure such an interpretation, La.Rev.Stat., 1950, 13:4231 et seq., and the United States of course may appear to urge its interpretation of the statute. See Stanley v. Schwalby, 147 U.S. 508, 512, 513, 13 S.Ct. 418, 419, 420, 37 L.Ed. 259. It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

"We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion." (Italics ours.)

The proceeding presently before us was instituted by Leiter Minerals, Inc., under the Louisiana Declaratory Judgments Act, Arts. 1871-1883, La.Code Civ. Proc., pursuant to the above quoted directive of the Supreme Court of the United States. Named as defendants are the Lobranos and the California Company; the United States is not a party to this proceeding.

The state district court in which this suit was filed concluded that Act 315 of 1940 applied to the mineral reservation contained in Leiter's deed to the United States, that the mineral rights so reserved were rendered imprescriptible by the act, and that the act was not unconstitutional in any respect. On appeal the Louisiana Fourth Circuit Court of Appeal reversed the state district court and decreed "that Act 315 of 1940 (LSA-R.S. 9:5806) does not apply in this case since the mineral reservation is of specific ex contractu duration, less than the prevailing statutory period of 10 years for non-user". See Leiter Minerals, Inc., v. California Co. et al., La.App., 126 So.2d 76, 82. On application of plaintiff Leiter we granted a writ of certiorari.

To us it is evident that in this action, instituted pursuant to the directive of the United States Supreme Court under the Louisiana Declaratory Judgments Act, we are called upon to render only an advisory opinion. As between litigants this court has consistently refused to render advisory opinions under the Declaratory Judgments Act, for even under this act there must be a justiciable controversy, which does not exist in this proceeding. Tugwell v. Members of Board of Highways, 228 La. 662, 83 So.2d 893 (on rehearing), and numerous authorities there cited. Furthermore, it is proper for us to refuse a declaratory judgment or decree where such a judgment or

decree would not terminate the uncertainty or the controversy giving rise to the proceeding. Art. 1876, La. Code Civ.Proc. Our opinion here will not terminate the uncertainty or the controversy existing between the parties to the instant suit. This case is unusual, however, in that the highest court in the land deems it "advisable" for us to render such an opinion. Therefore, out of respect for, and as a courtesy to, that court, we proceed to do so, in the hope that our opinion will be of some assistance to the United States Supreme Court in its solution of the fundamental question raised in the litigation pending in the federal courts. Moreover, there can be no doubt that there is a real controversy as to the ownership of the mineral rights in the suits pending in the federal and state courts.

As we view the matter both the Louisiana district court and the Louisiana Court of Appeal went far beyond the directive of the United States Supreme Court, as our state courts were not asked to interpret or construe the reservation of the mineral rights in the deed to the United States. In this connection, however, we cannot help but observe that the Court of Appeal in reaching its conclusion did not consider the entire reservation but concentrated its whole attention on a single date in it. In this it was in error, for under Article 1955 of our Civil Code "All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act". For this reason the decision of the Court of Appeal on this point should not be given any weight.

It is apparent that the fundamental question raised both in Leiter's first suit in the state court, which has been stayed by the preliminary injunction, and in the government's suit in the federal court is whether the mineral servitude created by Leiter's

reservation of the mineral rights in the 1938 deed to the United States was rendered imprescriptible by Louisiana Act 315 of 1940, R.S. 9:5806. No court can answer this question without determining what the parties to the deed intended by the mineral reservation. The intention of the parties should be ascertained from the instrument itself without the aid of extrinsic evidence, but if the instrument is so ambiguous that there is doubt as to what the parties intended, extrinsic evidence may be resorted to as an aid in interpretation. La.Civ.Code Art. 1956; Plaquemines Oil & Development Co. v. State of Louisiana, 208 La. 425, 23 So.2d 171. We are mindful, however, that the interpretation of this reservation is for the United States courts, and not for us in this proceeding, even though Leiter's petition in this suit, after praying for an interpretation of Act 315 of 1940 as outlined in the opinion of the Supreme Court, asks the court to declare that Act 315 of 1940 applies to the mineral reservation in the deed to the government.

Our only task is to interpret Act 315 of 1940. To do so intelligently it is necessary for us first to set forth certain general principles of law pertaining to mineral reservations. When these general principles are understood, the purpose of the act and the problems it is designed to meet are readily ascertainable.

In this state oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form a part; in other words, in Louisiana there is no separate estate in or ownership of oil and gas in place. Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207. The sale or reservation of mineral rights does not vest in the one buying or reserving them an estate in the minerals; it creates only a right to go upon

the land and produce the minerals, and establishes a *servitude* upon the land. Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623; Frost-Johnson Lumber Co. v. Nabors Oil & Gas Co., 149 La. 100, 88 So. 723; Wemple v. Nabors Oil & Gas Co., 154 La. 483, 97 So. 666; Ware v. Baucum, 221 La. 259, 59 So.2d 182. Such a servitude can be created only by the owner of the land. La.Civ.Code Arts. 743, 770; Bourg v. Hebert, 224 La. 535, 70 So.2d 116, and cases there cited. The mineral servitude established either by sale or by reservation is extinguished by the prescription resulting from non-user of the servitude for 10 years following its creation. La.Civ.Code Arts. 783(2), 789, 3546; Lynn v. Harrington, 193 La. 877, 192 So. 517; Sellington v. Producers' Oil Co., 152 La. 81, 92 So. 742; Frost-Johnson Lumber Co. v. Salling's Heirs, 150 La. 756, 91 So. 207 (on second rehearing). Use or exercise of the servitude will preserve it for another period of 10 years. Lee v. Giauque, 154 La. 491, 97 So. 669; Louisiana Petroleum Co. v. Broussard, 172 La. 613. 135 So. 1.

Over the years the federal government has acquired huge tracts of land in this state for such purposes as wild life and game refuges, national forests, spillways, military installations, and camps, and it is now the largest landowner in this state. Some of the tracts acquired for these purposes contain as much as a half-million acres. These various tracts were bought by the government at a relatively low price per acre, evidently because the vendors in most cases reserved the mineral rights, which were, potentially at least, much more valuable than the lands, and the federal government in such sales where the mineral rights were reserved did not expect or intend to acquire the mineral rights. The government, however, had some difficulty in acquiring these lands as

their owners did not wish to sell unless they could reserve the oil and gas for a longer period than 10 years without use. In some cases the agents of the United States advised the vendors that the Louisiana law of prescription for non-use did not apply to lands purchased by the United States, and some sales could not have been effected by the government if its representatives had taken the position that the Louisiana law of prescription applied. The government did not have this particular problem in purchasing lands in other states because no restriction prevented the landowners there from reserving the minerals in perpetuity. Under these circumstances the Louisiana Legislature adopted Act 315 of 1940 to preserve to the vendors the mineral rights in tracts sold to the government and to facilitate the government's acquisition of lands in Louisiana. Thus, one of the primary purposes of Act 315 of 1940 was to keep prescription from running against mineral rights which were reserved when the land was sold to the United States. These facts and circumstances are shown in a decision of the United States district court, United States v. Nebo Oil Co., D.C., 90 F.Supp. 73.

There can be no doubt, however, that there were other objects and purposes for the enactment of Act 315 of 1940, which made mineral rights in lands sold to the government imprescriptible and thereby preserved these mineral rights in the vendors.

One of the important sources of revenue of the State of Louisiana is the severance tax which is levied and collected by the state when natural resources such as oil and gas are produced and extracted from the land. If the mineral rights were owned by the federal government in lands which the government had purchased, the mineral owner's share of the oil and gas produced from these lands would

not be subject to taxation by the State of Louisiana, and the state would be deprived of large sums in taxes, especially since an immense area is owned by the federal government in oil-producing sections of this state, as the very facts of this case disclose.

Moreover, the State of Louisiana in the exercise of its police power has authority to protect, conserve, and replenish the natural resources of the state and to prohibit and prevent their waste. See Art. 19, Sec. 18, and Art. 6, Sec. 1, La.Const. of 1921. Under this power the Legislature has adopted laws regulating and controlling the production of oil and gas within the state. By making mineral rights imprescriptible in lands sold to the government and retaining these rights in the vendors, Act 315 of 1940 avoided a possible conflict by the state in the exercise of its police power with the federal government.

Counsel for the lessees of the United States contend that the mineral reservation in the deed established a servitude for a certain time, or a servitude of specific duration, and that under this interpretation the act is without application; that if the act were applied so as to make this servitude imprescriptible, the statute would be unconstitutional.

On the other hand, counsel for Leiter contend that the mineral reservation did not establish a servitude for a certain time or of specific duration, but established a servitude of uncertain and indefinite duration; that the parties to the deed fixed by contract a period of liberative prescription, as they were free to do; that before accrual of this conventional period of prescription the Legislature adopted the act which rendered the mineral servitude imprescriptible; that under this interpretation of the contract the act is applicable and constitutional.

As we have pointed out, we ourselves cannot construe the reservation in this proceeding; we can only give the law applicable under each of the two interpretations urged by counsel.

If the United States Supreme Court construes the reservation as one establishing a servitude for a certain time or of specific duration, as argued by the lessees of the United States, then Act 315 of 1940 is not applicable and if applied would be unconstitutional.

Under the laws of this state which we have cited and discussed, a reservation of minerals or mineral rights does not vest in the one reserving them an estate in the minerals; it creates only a servitude upon the land, the right to go upon the land and produce the minerals therefrom. Under Louisiana law servitudes can be established for a certain time. Article 821 of our Civil Code provides: "Servitudes are also extinguished when they have been established for a certain time only, or under a condition that in a certain event they shall cease; for when the time expires, or the event takes place, the servitude becomes extinguished of right." Article 783(6) provides that servitudes are extinguished by the expiration of the time for which the servitude was granted or by the happening of the dissolving condition attached to the servitude. An example of a servitude established for a certain time (a servitude of specific duration) is that created by the mineral reservation in the case of Hodges v. Norton, 200 La. 614, 8 So.2d 618. Counsel for the government's lessees argue that the mineral reservation in that case is similar to the reservation in the Leiter deed. For what it may be worth, our opinion is that it is not.

If a servitude is established for 10 years or less, it will remain in force for the time so stipulated re-

gardless of whether it is used by the servitude owner. In such a case no question of prescription arises because the servitude would expire by the terms of the contract before it could ever be lost by the 10-year prescription for non-user.

On the other hand, if the servitude is established for a definite period in excess of 10 years, for example, for 15 or 20 years, the servitude would remain in force for the entire period of 15 or 20 years provided the owner of the servitude did not permit a 10-year period to elapse without exercise of the right or servitude and thus lose it by the prescription of 10 years. La.Civ.Code Arts. 783(2), 789, 3546. Even if the right or servitude has been exercised, however, the servitude would expire and become extinguished at the end of the 15 or 20 years for which it was established. La.Civ.Code Arts. 821, 783(6).

Act 315 of 1940 makes imprescriptible mineral rights reserved in lands acquired by the United States, and where the reservation has been definitely fixed for a certain period in excess of 10 years, the right so reserved remains in full force and effect for the entire period specified even without use by the servitude owner; or, in other words, under the act the right is not lost by the vendor in such a case by the 10-year prescription of non-use. In such a case, however, the servitude would expire at the end of the time fixed for its duration regardless of whether it was being used at that time or not.

Where mineral rights in lands sold to the United States government are reserved for a certain, definite, and fixed time in the contract, or, in other words, where the servitude has been established for a certain or fixed time, at the expiration of the time fixed the servitude is lost or extinguished; and since

in such a case there is no question of prescription, Act 315 of 1940 is without application. If the act should be held to be applicable in such a case so as to extend the right or servitude beyond the time fixed by the contract for its duration, the act would operate to impair the obligation of the contract between the parties and to divest vested rights, and hence would be unconstitutional. Art. 4, Sec. 15, La.Const. of 1921.

If the United States Supreme Court concludes, as argued by counsel for Leiter, that the reservation does not establish a servitude for a certain time or of specific duration but establishes one of uncertain and indefinite duration, and that it was the intention of the parties to fix by contract the period of liberative prescription, then Act 315 of 1940 is applicable and constitutional.

Counsel for Leiter argue with much force that the reservation does not establish a servitude for a fixed or certain time. If this is true, the Louisiana law on servitudes of specific duration, set forth by us above in our discussion of the government's lessees' contention, is without application.

Most mineral servitudes are not established for a fixed time. A servitude of indefinite duration is extinguished only when it is not exercised for a period of 10 years. Such a servitude created by mineral reservation in a sale to the government would, under Act 315 of 1940, be rendered imprescriptible and would never be lost by prescription, provided it was in existence at the time the 1940 act went into effect.

Parties to a contract are free to stipulate as they please so long as their stipulations are not contrary to good morals or public policy or do not violate some law. La.Civ.Code Arts. 1764, 1895, 1901; American Cotton Co-op. Ass'n v. New Orleans &

Vicksburg Packet Co., 180 La. 836, 157 So. 733; Mente & Co. v. Roane Sugars, Inc., 199 La. 686, 6 So.2d 731; Givens v. Washington Nat. Ins. Co., La. App., 170 So. 810; Morris Buick Co. v. Ray, La.App., 43 So.2d 83. It has also been recognized in this state, and by the courts of other states and the Supreme Court of the United States, that those entering into a contract may stipulate a different period of prescription or limitation from that provided by a state statute, and that the limitation or prescriptive period as thus stipulated, if reasonable, will be binding upon the parties. Blanks v. Hibernia Ins. Co., 36 La.Ann. 599; Ray v. Liberty Industrial Life Ins. Co., La.App., 180 So. 855; see Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586, 67 S.Ct. 1355, 91 L.Ed. 1687 (in the absence of a controlling statute to the contrary); Hoagland v. Railway Express Agency, Fla., 75 So.2d 822. See also Wood, Limitation of Actions, v. I, p. 145, sec. 42 (4th ed. 1916).

In this state, however, parties to a contract are not permitted to establish a longer prescription for loss of mineral rights through non-use than the 10-year period established by the Civil Code for the loss of a servitude through non-use, because it is against the public policy of this state to allow such servitudes to remain alive for a longer period than 10 years without use. Nevertheless contracting parties are at liberty to establish a contractual period of prescription for the conditional extinguishment of the servitude through non-use, provided the period is 10 years or less.

As we have previously stated, one of the primary objects of Act 315 of 1940 was to prevent the federal government from acquiring mineral rights by prescription in this state when those rights were reserved in sales to it, and the act in plain language

provides that such rights "shall be imprescriptible". The act draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective. See Ray v. Liberty Industrial Life Ins. Co., La.App., 180 So. 855.

This court has already held that Act 315 of 1940 is applicable to mineral reservations in all sales which were made to the United States before its adoption provided the prescriptive period had not expired before the act became effective; or, stated somewhat differently, this court has concluded that the statute was a remedial one and was retrospective in its operation. Whitney Nat. Bank of New Orleans v. Little Creek Oil Co., Inc. et al., 212 La. 949, 33 So.2d 693. See also United States v. Nebo Oil Co., D.C., 90 F. Supp. 73; 5 Cir., 190 F.2d 1003.

Act 315 of 1940 does not violate Article 4, Section 15, of the Louisiana Constitution of 1921, which provides that vested rights shall not be divested and that no law impairing the obligation of contracts shall be passed.

In this state when property is conveyed and the mineral rights are reserved, the party reserving the minerals is vested with a real right, the right to go upon the land and produce the minerals. In such a case the purchaser of the land subject to this servitude does not acquire the mineral rights, the ownership of which is vested in the vendor. As to the minerals, all the purchaser has acquired is the expectancy or hope that the mineral servitude will be extinguished by the 10-year prescription of non-use and will not be

extended or continued by use beyond this period. Where the minerals have been reserved, the purchaser of the land pays nothing for them and has no vested right in them. As said by this court in Tennant v. Russell, 214 La. 1046, 39 So.2d 726, 728, "A right is *vested* when 'the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete, and unconditional, independent of a contingency, and a mere expectancy of future benefit, or a contingent interest in property * * * does not constitute a vested right.' 16 C.J.S. Constitutional Law § 215, page 642." See also United States v. Nebo Oil Co., D.C., 90 F.Supp. 73; 5 Cir., 190 F.2d 1003.

In United States v. Nebo Oil Co., supra, both the United States district court, and the United States Court of Appeals concluded that Act 315 of 1940 did not impair the obligation of contracts in contravention of the federal Constitution, and cited numerous authorities in support of this conclusion. For the reasons there given we conclude that Act 315 of 1940 does not violate the corresponding, identical provision of the Louisiana Constitution.

To summarize in conclusion, it is our view, and we hold: First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as not establishing a servitude for a fixed, definite and certain time, and if it is decided that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act

315 of 1940 is applicable and constitutional. The interpretation of the contract is for the United States courts.

In the instant proceeding both the state district court and the state Court of Appeal, as we have pointed out, went beyond the Supreme Court's directive when they construed the contract. Accordingly we think that the judgment of both courts should be annulled, reversed, and set aside, and that the proper decree is merely to dismiss plaintiff's suit.

For the reasons assigned both the judgment of the district court and the judgment of the Court of Appeal are annulled, reversed, and set aside, and plaintiff's suit is dismissed. All costs of this proceeding are to be paid one-half by plaintiff and one-half by defendants.

FOURNET, Chief Justice (dissenting in part and concurring in part).

While I recognize that this litigation was instituted under the Louisiana Declaratory Judgments Act, Articles 1871-1883 of the Louisiana Code of Civil Procedure, pursuant to a directive of the United States Supreme Court, I cannot subscribe to the majority view that because of this fact we are called upon to render only an advisory opinion in this case and that, accordingly, "both the Louisiana district court and the Louisiana Court of Appeal went far beyond the directive of the United States Supreme Court, as our courts were not asked to interpret or construe the reservation of the mineral rights in the deed to the United States."

And while it is equally true that the federal courts may not choose to follow any decree we may render herein, although it is a generally accepted procedure for the federal courts to follow the decisions of the

highest courts of the respective states in the interpretation of their laws where such decisions violate no provision of the United States constitution, I know of no authority or right this court has empowering it to render an "advisory" opinion under the Declaratory Judgments Act, as is being done by the majority here. In my humble opinion, not only is the authority of this court limited by the Louisiana constitution in such cases to a review of the decisions of the lower courts of this state, but the constitution also imposes an obligation and duty upon this court to review such cases in all of their aspects.

The fact that the case under consideration here was instituted because of the suggestion, or directive, to be found in the decision of the United States Supreme Court does not change the character of the declaratory judgments action, nor does it enlarge or decree the prerogatives of this court under the circumstances any more than would be the case if bonding attorneys in a given case were to require a decision of this court on the question of the constitutionality of the issuing authority for such bonds. The procedure would be identical to that in the instant case, as the action would have to be instituted in a district court of competent jurisdiction, and it could only reach this court (1) on appeal, in the event the act involved were to be found unconstitutional in the lower court; or (2) on a writ, as in the instant case, to review a judgment of an intermediary appellate court.

For the purpose of the record, however, I wish to state that I am of the view the majority opinion has properly construed the statute in question, its applicability, and its constitutionality. I am further of the view that the matter was properly resolved by the district judge, whose opinion is quoted in full by Mr. Justice HAMLIN in his dissent.

HAMLIN, Justice (dissenting).

I am compelled to dissent from the majority opinion.

The Leiter Minerals, Inc., applicant for writs herein, submits that the judgment of the Court of Appeal, Fourth Circuit, should be reversed and the judgment of the district court reinstated.

Since I agree with the contention of the applicant, and believing that the unpublished opinion of the district court is eminently sound in law and correctly sets at rest the issues involved herein, I adopt it as my dissent:

"This is a declaratory judgment action brought by the Plaintiff, The Leiter Minerals, Inc., a Louisiana corporation, against the defendants, The California Company, Allen L. Lobrano and Mrs. Ethel M. Fontenelle Lobrano, individually and as natural tutrix of her minor children, Robert Leo Lobrano and Karen Katherine Lobrano, pursuant to the decision of the U. S. Supreme Court which was rendered on January 14, 1957. The Leiter Minerals, Inc. v. United States, 352 U.S. 220, 1 L.ed.2d 267, 77 S.Ct. 287.

"For the purposes of this decision, the following summary of the litigation is sufficient:

"The Leiter Minerals, Inc., as successor in title to Thomas Leiter, claims to be the owner of the minerals under a large tract of land in Plaquemines Parish, Louisiana. The claim of Plaintiff is based on a reservation made by Thomas Leiter in a sale of the land to the United States of America on December 21, 1938, recorded in Plaquemines Parish Conveyance Book 112, Folio 479. The pertinent portion of the mineral reservation insofar as the present litigation is concerned reads as follows:

" 'The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000 being the purchase price paid by said United States of America for the aforedescribed properties.

" 'Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producting, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

" 'Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

" 'Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

" 'The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above set forth, remain vested in the vendors.'

"In 1940 the Legislature of Louisiana passed Act 315 dealing with reservations of mineral rights that were involved in sales to the government or in condemnation proceedings by the government. The relevant sections of the Act read as follows:

" 'Section 1. Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed, or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals, or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible.'

"Plaintiff, in 1953, filed a petitory action in this Court against the California Company and others, asserting the Plaintiff's title to the minerals under the above reservation.

"The subsequent history of the case shows that after the petitory action had been pending in this Court for several months and after this Court had rendered a decision overruling all of Defendants' exceptions in the petitory action, the United States government filed a suit in the Federal Court in New Orleans and obtained a preliminary injunction against the Plaintiff proceeding in the petitory action. The injunction suit in the Federal Court finally went to the U. S. Supreme Court, which, on January 14, 1957, rendered its said decision, and modified the injunction which had previously been granted by the lower Federal courts and permitted the parties to file a declaratory judgment suit in Louisiana State court so as to obtain an interpretation of the 1940 statute by the Louisiana Supreme Court. The following language of the U. S. Supreme Court's decision is quoted as follows:

" 'The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to *this situation*[1] it would impair the obligation of the Government's contract. Petitioner contests these contentions. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of

[1] It is my view that the words "this situation" mean the situation prevailing in the instant case and that we must look into and interpret the provisions of the contract; otherwise, we are not completely answering the questions propounded by the United States Supreme Court.

interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana laws? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, La.Rev. Stat., 1950 Sect. 13-4231 et seq., and the United States of course may appear to urge its interpretation of the statute. See Stanley v. Schwalby, 147 U.S. 508, 512, 513, 37 L.ed. 259, 261, 262, 13 S.Ct. 418. It need hardly be added that the state courts in such a proceeding can decide definitely only questions of state law that are not subject to overriding federal law. [Emphasis mine.]

" 'We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion.'

"This suit was filed by the Plaintiff in compliance with the U. S. Supreme Court decision and was tried before this Court on March 11, 1959. The matter has now been submitted to the Court upon written briefs filed by the parties.

"A decision in this matter by this Court has been made much easier by reason of the fact that both the Supreme Court of Louisiana and the U. S. Court of Appeals for the 5th Circuit have previously rendered decisions construing Act 315 of 1940 in a number of respects helpful o a proper decision in the present

case. The decisions referred to are the case of Whitney National Bank of New Orleans vs. Little Creek Oil Co., 212 La. 949, 33 So.2d 693 and U. S. vs. Nebo Oil Co., 190 F.2d 1003. In the latter decision, the U. S. 5th Circuit Court of Appeals affirmed the comprehensive opinion of District Judge Gaston L. Porterie in the lower court. See U. S. vs. Nebo Oil Co. [D.C.], 90 F.Supp. 73.

"The fact that the deed from Thomas Leiter to the U. S. was executed prior to the passage of Act 315 of 1940 does not make the 1940 Act inapplicable to the previously executed sale and mineral reservation.

"In the Whitney National Bank [of New Orleans] vs. Little Creek Oil Co. case and in the U. S. vs. Nebo Oil Company decision, both the State and the Federal Courts, squarely held that the 1940 Act was retrospective in its operation. It should be noted that in both of the above cases, the sales and reservations were made a much longer period prior to the 1940 Act than Leiter's sale and mineral reservation in the present case.

"It is this Court's opinion, therefore, that since both the Louisiana Supreme Court and the Federal Courts have held Act 315 of 1940 to be retrospective, it clearly applies to Leiter's 1938 mineral reservation.

"There remains only two additional points which this Court feels it must consider in deciding this case.

"The first question is whether the Act applies to the 1938 mineral reservation quoted above in view of the language used therein. The next and final question is, if the 1940 Act applies to Leiter's 1938 reservation and thereby renders the mineral reservation imprescriptible, whether the Act is unconstitutional.

"On the first point, in view of the very broad and comprehensive language in the 1940 act and the apparent objective which the Legislature had in mind

when it passed the Act, it seems plain to this Court that the 1940 Act is fully applicable to Leiter's mineral reservation.

"It is well recognized, both in this State and in other jurisdictions, that the parties to a contract can establish a period of limitation or prescription. It is clearly within the Legislature's power to enact legislation which affects equally all prescriptions, both statutory and conventional. If the Legislature intended to limit Act 315 to the 10 yr. prescriptive period established by the Civil Code of Louisiana, the Legislature would have indicated its purpose to so limit the scope of the Act.

"Not only is there no language in the 1940 Act which would indicate the Legislature's purpose to qualify or limit the application of the Act but the obvious public policy of the State as demonstrated by the passage of that Act makes it unreasonable to believe that the Legislature had in mind any limited application of the Act. Judge Porterie, in the Nebo case used the following language:

" 'Moreover, the Federal Government is the largest landowner in Louisiana, and the dedication of large tracts for public purposes, such as forests and game preserves, withdraws these lands from commerce. It would appear entirely reasonable under these circumstances for the Louisiana Legislature to do all in its power to preserve the mineral rights in its citizens.'

"It was held, in Ray vs. Lib. Ind. Life Ins. Co. [La.App.] 180 So. 855, that a 1932 statute dealing with the subject of interruption of prescription and which, similar to the case here, did not limit the scope of its application, applied to conventional as well as statutory prescription.

"In 1938, when Leiter sold to the government and reserved the mineral rights, the government had no assurance that the mineral rights would not be forever preserved to the vendor. The government's right to become thereafter vested with the ownership of the minerals, depended entirely on the uncertain future. The contract contained specific provisions which would have permitted Leiter to maintain his mineral rights forever, or at least indefinitely. It is this Court's considered opinion that what the parties did in 1938 was to establish, in a mode not prohibited by law or public policy, a conventional or contractual prescription as to the mineral rights and when the Legislature passed Act 315 a year and a half later, those mineral rights were still in effect. Likewise, at the time the Legislature passed the 1940 Act the government's rights to the minerals were just as contingent and uncertain as they were when Leiter executed the deed in 1938.

"*It is this Court's opinion that the language of Leiter's mineral reservation merely established the minimum term of the reservation, and not the maximum term. The maximum term, according to the language of Leiter's reservation, was left entirely indeterminate and indefinite.* [Emphasis mine.] Judge Porterie, in the Nebo case (90 F.Supp. 73, 89) discussed this very question and held:

" 'There are also specially reserved by and unto the Bodcaw Lumber Company of Louisiana, Incorporated, the vendor herein, all the oil, gas and other minerals, in, on and under all of the lands conveyed herein and which is subject to the two sales to the Good Pine Oil Company, Incorporated, mentioned above, *for a period of ten years* after the expiration of the rights of the said Good Pine Oil Company, Incorporated, under the laws of the State of Louisiana.

" 'At the termination of the ten (10) year period, if not extended, or at the termination of any extended period * * * the right to drill for and remove oil and gas and to mine and remove minerals shall terminate, and a complete fee in the land became vested in the United States.

* * * *

" 'It is clear that under the deed dated November 12, 1932, Bodcaw conveyed the mineral rights to Good Pine Oil Company in perpetuity. The last clause sets forth the *minimum term of the grant* and in no way seeks to restrict the terms of the conveyances.'

"It is therefore, this Court's decision that the 1940 Act applies to the 1938 reservation by Thomas Leiter and that the rights of Leiter were then and thereafter rendered imprescriptible.

"The final question is the constitutional issue which has been raised by the Defendants. It is not difficult for the Court to decide these constitutional questions as they are fully disposed of in both the District Court's and the Courts of Appeals' decision in U. S. v. Nebo. As was decided in the Nebo decisions, the government at the time of the execution of the deed in 1938, as well as at the time the Legislature passed the 1940 Act, did not have any *vested* rights which were impaired or divested. The government's 'rights', as had already been declared in this opinion and as the District Court and the U. S. Court of Appeals held in the Nebo decisions, were entirely contingent and inchoate. In other words, all that the government had was a mere expectancy or a hope and the Legislature in 1940 was well within the State and Federal constitutional provisions in passing Act 315 dealing with mineral reservations which had been executed prior to that time. On appeal, in the Nebo case the Federal Court of Appeals declared:

" 'We conclude that this so-called "reversionary interest" is nothing more than a mere expectancy, or hope, based upon an anticipated continuance without change of the applicable laws of prescription and cannot be regarded as a vested right protected by the Constitution.'

"The only argument which the Defendants make on the constitutional points is to refer to Section 15 Article IV of the Louisiana Constitution which prohibits the passing of any law impairing the obligation of contracts or the divesting of vested rights. As this Court has already stated, the government did not have any vested rights in 1940 and it is difficult for this Court to perceive how the government's contract could be impaired if the government at that time did not have any vested rights arising out of the contract. Also, the decisions are uniform that in cases like this, Act 315 is valid as a reasonable exercise of the police power of the State. U. S. vs. Nebo Oil Co. [D.C.], 90 F.Supp. 73; affirmed [5 Cir.], 190 F.2d 1003 and the many decisions there cited.

"For these reasons it is this Court's opinion that Act 315 of 1940 applies to the mineral reservation contained in the deed of Thomas Leiter to the U.S. in 1938; that the mineral rights to be reserved were rendered imprescriptible by Act 315 of 1940; and that the Act of 1940 is not unconstitutional in any respect."

I respectfully dissent.

FOURNET, C. J., and HAMLIN, J., adhere to the views expressed in their written opinion; and, therefore vote for a rehearing in order that a judgment may be rendered accordingly. SUMMERS, J., joins in the view that a rehearing should be granted so that a judgment may be rendered on all of the issues involved in the case.

DISTRICT COURT OPINION

UNITED STATES OF AMERICA, PLAINTIFF

v.

The LEITER MINERALS, INC., ET AL., DEFENDANTS

Civ. A. No. 4379-B.

United States District Court
E. D. Louisiana,
New Orleans Division.

April 11, 1962.

J. SKELLY WRIGHT, District Judge.

This case has a tortuous history. It begins in a Louisiana state court almost nine years ago, when the Leiter Company, successor to the interests of the Leiter family, former owners of substantial acreage in Plaquemines Parish, Louisiana, who in 1938 had sold their lands to the Government for a wildlife refuge with a reservation of the minerals, filed suit [1] against one of the mineral lessees of the United States, Allen Lobrano,[2] and the operator under that lease, the California Company. Though, by its own terms, the mineral reservation had long expired when the Government granted its lease in 1949, the Leiter

[1] Plaquemines, Louisiana, No. 3282, filed August 13, 1953.

[2] For reasons unexplained, the heirs of the other lessee of the United States, Frank J. Lobrano, were not joined as defendants in that initial suit. In all subsequent proceedings, however, they have been made parties.

Company invoked a 1940 Louisiana statute [3] which, they said, preserved their mineral ownership indefinitely. The question had become important because of the discovery of very valuable oil deposits under the lands in 1950.

There was an effort to remove that initial proceeding here, but, no federal question appearing, this court remanded.[4] Thereupon, the United States instituted the present suit to quiet its title to the minerals. The Government obtained an injunction against the concurrent state proceedings.[5] That action was affirmed by the Court of Appeals,[6] and ultimately by the Supreme Court.[7] But, in view of the obvious constitutional questions raised if the Louisiana statute were held retroactively applicable to the contract of

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[3] La. Act 315 of 1940, now LSA-R.S. 9:5806, quoted in pertinent part, infra, Note 23.

[4] The Leiter Minerals, Inc. v. The California Company, et al., E.D.La., Civil Action No. 4090. In remanding, this court noted: "A federal question may be 'lurking in the background' in this case, but its presence is not sufficiently disclosed by plaintiff's petition; nor is the question, if present, a substantial one." But the only basis asserted for the removal was an allegation that the case "involved the interpretation and application of" the Migratory Bird Conservation Act, 16 U.S.C.A. § 715 et seq., and the Mineral Leasing Act for Acquired Lands, 30 U.S.C.A. § 351 et seq., which, under the Supremacy Clause, superseded state law. The constitutional issues outlined later in this opinion were not then before the court.

[5] United States v. Leiter Minerals, E.D.La., 127 F.Supp. 439.

[6] Leiter Minerals v. United States, 5 Cir., 224 F.2d 381.

[7] Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267.

sale, the Supreme Court indicated the propriety of obtaining from the state courts an authoritative interpretation of Act 315 of 1940.[8] Accordingly, the Leiter Company filed a declaratory judgment proceeding in the Louisiana District Court.[9] Despite the restricted petition, drawn by this court, the state trial judge adjudicated the whole case, awarding the minerals to

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[8] Id., 229, 77 S.Ct. 292: "The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to this situation, it would impair the obligation of the Government's contract. Petitioner disagrees. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court."

[9] The first petition filed in effect asked the state court to adjudicate the whole case. The Leiter Minerals, Inc. v. The California Company, et al., 25th Judicial District Court for the Parish of Plaquemines, No. 4240, filed April 25, 1957. Since it therefore violated the outstanding injunction issued by this court and the abstention order of the Supreme Court, it was removed here and stayed. The Leiter Minerals, Inc. v. The California Company et al., E.D.La., Civil Action No. 6708. The parties being unable to agree on a form of declaratory petition, the court ultimately drew the petition to be filed in the state court.

Leiter.[10] He was reversed by the Louisiana Court of Appeal,[11] but again the decree went too far. Finally, the Louisiana Supreme Court took the case and rendered a declaratory judgment in proper form.[12] The case here now proceeds with helpful guidance from the opinion of the highest state court.

That opinion, however, does not,[13] as it could not,[14] resolve serious doubts concerning the constitutionality of the Louisiana Act. There is not only the obvious bar of the Contract Clause to any impairment

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[10] The Leiter Minerals, Inc. v. The California Company, et al., 25th Judicial District Court for the Parish of Plaquemines, No. 4557. While the opinion of the District Judge is not reported, it is reproduced in the dissenting opinion of Justice Hamlin of the Louisiana Supreme Court. See Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845, 856 ff.

[11] Leiter Minerals, Inc. v. California Company, La.App., 126 So. 2d 76. Initially, the appeal had been taken to the Louisiana Supreme Court, but, finding itself without jurisdiction, that court transferred the appeal to the Louisiana Court of Appeals for the Fourth Circuit. Leiter Minerals, Inc. v. California Company, 239 La. 116, 118 So.2d 124.

[12] Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845.

[13] The views expressed in the Louisiana Supreme Court decision relating to the "constitutionality" of the statute clearly intend to adjudicate its validity under the Louisiana Constitution only. While the Louisiana provisions may be similar to those of the United States Constitution, it does not follow that the state court's ruling prejudices the federal constitutional claims. See Note 14, infra.

[14] The Supreme Court in this case cautioned: "It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law." Leiter Minerals, Inc. v. United States, 352 U.S. 220, 229-230, 77 S. Ct. 287, 1 L.Ed.2d 267.

of the obligation of contracts.[15] U.S. Const., Art. 1, § 10, cl. 1. Also implicit in any application of the statute here are questions under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. If Act 315 is held to work a forfeiture of substantial mineral rights owned by the United States, is this deprivation of property reasonably necessary in the service of a legitimate governmental objective? And, in any event, does this discrimination directed against the federal government and its lessees result from a reasonable classification? The last question has a sharper edge when we learn that Louisiana once dealt itself the same treatment as it now reserves for the United States alone.[16] But, fortunately,

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[15] The ruling in United States v. Nebo Oil Co., 5 Cir., 190 F.2d 1003, affirming, W.D.La., 90 F.Supp. 73, does not dispose of this question. The court there held that the "hope" of the Government, as landowner, for a return of the minerals, based solely on the Louisiana law of prescription, was not a contract right impaired by the passage of Act 315 of 1940. But, query, whether a similar expectation, based on a contractual stipulation (whether called a "term" or a "contractual period of prescription") can be abrogated by a subsequent law without offending the Contract Clause.

On the other hand, it may be that the Contract Clause question is eliminated because, at the time the deed was executed, the seller could have had no such expectation in view of Act 151 of 1938 which already rendered imprescriptible mineral reservation in sales to the United States. La.Act 151 of 1938, repealed by La.Act 315 of 1940. Yet, it is arguable that the Letters were then merely performing an inescapable duty to execute a deed, all the terms of which had been settled in 1935, in which case the 1938 Act might itself be viewed as working an impairment of the obligation of contracts.

[16] Act 151 of 1938, Note 15, supra, rendered imprescriptible mineral reservations in sales to both the United States and the State of Louisiana. See also, La.Act 68 of 1938, repealed by Act 315 of 1940.

these and other federal issues can be avoided if Act 315 of 1940 is inapplicable in the premises. And that is the conclusion to which we are led when we attempt to superimpose the statute, elucidated as it has been by the Louisiana Supreme Court, on the present facts, as they appear.

We begin with one certainty. The mineral reservation in the deed of sale from Thomas Leiter to the United States in December, 1938, created a mineral servitude in favor of the seller. Such a servitude is, according to the Louisiana Supreme Court, "a right to go upon the land and produce the minerals." Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845, 850, 852, 854. Like most servitudes, a mineral servitude is usually established for an indefinite duration.[17] In the absence of a stipulated term, it will normally endure until the minerals are exhausted, unless the holder fails to exercise his servitude and allows it to prescribe. LSA-C.C. art. 783 (2). As a matter of law, the right of servitude prescribes ten years from the day it ceases to be used, LSA-C.C. arts. 789, 790, 3546, though the parties may contractually shorten that period. Leiter Minerals, Inc. v. California Co., supra, 853.[18] To avoid this prescription for non-usage, however, the servitude holder need not actually remove minerals from the land. Much less is it necessary that there be pro-

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[17] "Most mineral servitudes are not established for a fixed time." Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So. 2d 845, 853. See also, Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, in 25 Tulane L.Rev. 30, 53.

[18] They cannot, however, lengthen the legal period of prescription. Leiter Minerals, Inc. v. California Co., supra, 853-854.

duction of oil or gas in paying quantities, or for stated periods. The servitude is preserved, for the whole tract,[19] by mere bona fide drilling. Keebler v. Seubert, 167 La. 901, 120 So. 591. And even the drilling of one dry hole will save the servitude for a full ten year period of inactivity. Lynn v. Harrington, 193 La. 877, 192 So. 517; Hunter Co. v. Ulrich, 200 La. 536, 8 So.2d 531; McMurrey v. Gray, 216 La. 904, 45 So.2d 73; Harrison v. Grandison Co., E.D.La., 51 F.Supp. 768.

But, like other conventional servitudes, mineral servitudes may also be created for only limited periods. LSA-C.C. arts. 783(6), 821.[20] The term of such servitudes may be fixed by reference to a date, the expiration of a stated number of years,[21] the occurrence of an event, or any combination of these methods. LSA-C.C. art. 821. The stipulation of a te[illegible] it is true, does not avoid the rule of prescription [illegible] non-use. Hodges v. Norton, 200 La. 614,

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[19] Assuming the servitude applies to a single tract, as here. When there are noncontiguous areas, each must be used to preserve the servitude. Lee v. Giauque, 154 La. 491, 97 So. 669.

[20] The rule is re-affirmed by the Louisiana Supreme Court in this case. Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 852.

[21] Hodges v. Norton, 200 La. 614, 8 So. 2d 618, furnishes an example of this type of servitude for a flat term. As the Louisiana Supreme Court noted (though, strictly speaking, it was not an issue there), the duration stipulation in Hodges is unlike that in the present case, because here we cannot "concentrate on a single date" (as the Louisiana Court of Appeal apparently sought to do). Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 850, 852. But that does not resolve the question whether the provisions here announce a term of a different kind, or a "contractual period of prescription."

8 So.2d 618. But its normal effect is to shorten the duration of the mineral servitude and establish a predictable termination date. The servitude ends at the time specified, although it is then actively exercised, or has not been abandoned for a period sufficient to accrue prescription. Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 852.

In short, with respect to duration, there are two kinds of mineral servitudes: perpetual servitudes which prescription [22] alone will curtail and servitudes for a term which end at the expiration of the time stipulated. In which category does the Leiter servitude fall? The question is crucial, for the Louisiana Supreme Court has held that Act 315 of 1940 [23] removes the prescriptive bar to perpetual servitudes, but does not affect the duration of servitudes for a term: [24]

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[22] Legal or conventional.

[23] In pertinent part, the Act reads as follows:

"Be it enacted by the Legislature of Louisiana, That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

[24] The language of the statute clearly supports this conclusion. It is said that the rights "shall be *imprescriptible*," supra, Note 23, not that all mineral rights in such sales shall be "perpetual." However, there is no occasion for this court to interpret the Act. That was the task of the Louisiana Supreme Court, and this court merely applies its interpretation.

"To summarize in conclusion, it is our view, and we hold: First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for the definite, fixed and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as not establishing a servitude for a fixed, definite and certain time, and if it is decided that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional." Leiter Minerals, Inc. v. California Co., 241 La. 915, 132 So.2d 845, 854-855. The reservation in question reads:

"The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000, being the purchase price paid by said United States of America for the aforedescribed properties.

"Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

"Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

"Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

"The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above set forth, remain vested in the vendors."

There is nothing difficult about the interpretation of this provision.[25] It very clearly establishes a mineral servitude for a term of ten years,[26] subject to partial renewal for additional five year terms in the event of actual production in paying quantities for specified periods. Obviously, the duration of the reservation is not governed by the usual laws of prescription. The only remaining question is whether the parties were contracting for "a period of contractual prescription."

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[25] While the controlling principles of Louisiana mineral law are taken from the opinion of the state court, this court must interpret the contract for itself. Whatever hints the parties think they read in the Louisiana Supreme Court's decision, no intention to construe the reservation in suit can properly be ascribed to that court. Indeed, the judges of the Louisiana court said so expressly: "We are mindful, however, that the interpretation of this reservation is for the United States courts, and not for us in this proceeding;" and, again, "As we have pointed out, we ourselves cannot construe the reservation in this proceeding;" "The interpretation of the contract is for the United States courts." Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 850, 852, 855.

[26] It will be noted that while the reservation refers to a primary term of ten years, it also sets April 1, 1945, as the termination date of the servitude, though the sale was consumated December 21, 1938. The explanation is that the reservation in the deed was copied from a contract to sell executed by the parties in March, 1935, and that the formal sale was then expected to occur on April 1, 1935. Obviously, an adjustment should have been made in the act of sale, either by changing the date mentioned to "December 21, 1948," or by correcting the "ten (10) year period" provision. It is difficult to know which was intended. For the purpose of the opinion, however, the court accepts the defendant's contention that the primary term of the reservation was to be ten years from December 21, 1938. Since the renewal conditions had not then been met, it makes no real difference which interpretation is accepted.

At the outset, we note that, unlike Nebo, supra,[27] the word "prescription" is never mentioned in the contract. The ten and five year spans involved are referred to as "periods of reservation," unaffected by the stopping and starting of the running of prescription by use and non-use. But this is not all. There are other essential differences between the effect of these provisions and the rules of liberative prescription. These may be summarized:

First, under the present contract, *a large area will be released* from the servitude after the expiration of ten years *regardless of use or production*, for only 25 acres around each well are saved in any event.

Second, no use of the servitude short of *actual production in paying quantities for at least fifty days a year for three years* will preserve any part of the servitude beyond the primary term.

Third, only production in the *last three years* of the primary term will renew the servitude.

Fourth, even the requisite production at the right time will renew the servitude for *only five additional years.*

These are not the characteristics of legal prescription, nor of any known contractual variant. "Contractual prescription" is, at best, an odd notion. But if the Louisiana Supreme Court has indicated that the *period* of prescription may be varied by contract,[28]

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[27] No one here pretends that the contract in suit is similar to the one in Nebo. The deed construed in that case conveyed the minerals "forever," "absolutely and without limit for time," and expressly adverted to prescription as the only obstacle to perpetual duration of the servitude. United States v. Nebo Oil Co., supra, 190 F.2d 1005.

[28] Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 853.

neither here nor elsewhere has that court (or any other Louisiana court) suggested that all the modalities of the law of prescription can be changed conventionally. Doubtless, the result is permissible,[29] but only by the baldest perversion of the term could it be said that a contract so ordered is governed by "prescription." Clearly, the present stipulation sets a *term* for the reservation, which has nothing whatever to do with prescription, contractual or otherwise.

Should any doubt remain, the final proof that no prescriptive period is here involved lies in a very practical difference. The Louisiana Supreme Court itself has told us that an "uncertain and indefinite duration" is the hallmark of prescription. Leiter Minerals, Inc. v. California Co., supra, 241 La. 915, 132 So.2d 853. Here the hallmark is missing.

Unlike the uncertain life of a servitude subjected to the regime of prescription, the accrual of which may be interrupted and resumed at any time, the duration of the present right was definitely staked out in the reservation. As already noted, from the first it was known that an important area would be released from the servitude in ten years.[30] Nor was the fate of the remaining acreage left in doubt. Indeed, the contract itself fixed the termination date. True, that date, depending on circumstances, might be ten, fifteen, or twenty years from the execution of the deed. But, at least, it was always clear that

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[29] There is here no question of freedom to contract. The only issue is whether an admittedly valid stipulation establishes a "term" or a "period of contractual prescription."

[30] Since the renewal provisions, when applicable, operate only for an area of 25 acres around each producing well, the remaining acreage would, under any circumstances, be freed from the servitude at the expiration of the primary ten year term.

the right would end on one of these alternate dates, and at no other time. Moreover, if the parties did not know at the outset which of those possible dates would mark the demise of the servitude, they were enlightened much sooner than would be the case under the rule of prescription. Thus, under the actual facts of this case, before the end of the seventh year it was clear that, regardless of what later happened, the entire servitude would fall on December 21, 1948.[31]

The conclusion is plain that the parties did not intend,[32] and did not, establish a servitude for "an uncertain and indefinite duration," subject to "a period of contractual prescription." Their contract rejects the concept of prescription and provides a definite term for the exercise of rights under the servitude, subject to renewal on a limited basis, but again for a definite term. Under the ruling of the Louisiana Supreme Court, it follows that the reservation was not affected by Act 315 of 1940. Accordingly, the servitude expired by its own terms and the mineral rights reverted to the United States.

Plaintiff's motion for summary judgment granted. Defendant's motion for summary judgment denied.

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[31] The court here accepts defendant's contention that the date April 1, 1935, was inadvertently retained. See Note 26, supra.

[32] The intent to create only a limited servitude is consistent with the Government's plan to devote the lands to a bird sanctuary, which extended and indefinitely prolonged oil operations might well disrupt.

COURT OF APPEALS OPINION

The LEITER MINERALS, INC., APPELLANT,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

No. 19963

United States Court of Appeals
Fifth Circuit

March 3, 1964

RIVES, Circuit Judge.

The question presented is the right to mine and remove oil, gas, and other minerals from about 8711 acres of land in Plaquemines Parish, Louisiana, a right worth many millions of dollars. The mineral right was established in a deed dated December 21, 1938 from Thomas Leiter conveying the lands to the United States, and reserving the right to the minerals as follows:

> "The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America

5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000 being the purchase price paid by said United States of America for the aforedescribed properties.

"Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945.

"Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

"Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land becomes vested in the United States.

"The reservation of the oil and mineral rights herein made for the original period of ten (10)

years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above above (sic) set forth, remain vested in the vendors."

The appellant, Leiter Minerals, Inc., hereafter Leiter, is the successor in interest to the right reserved by Thomas Leiter, and bases its claim upon that reservation. It concedes that no minerals have ever been produced by either Thomas Leiter or any successor in interest to the right established by that reservation. The United States issued four oil and gas leases to Frank J. Lobrano and Allen Lobrano, who entered into operating agreements with The California Company, hereafter California. California completed the first producing well in January 1950. By May of 1954, 80 wells were producing, under which the royalty paid to the United States had then exceeded $3,500,000.00.

Under the terms of the reservation, it would be clear that the right to mine terminated and complete fee in the land became vested in the United States but for the possible operation on the mineral right of two Louisiana statutes. Act No. 151 of 1938, in existence at the date of the deed, provided:

"* * * That when real estate is acquired by the United States of America, the State of Louisiana, or any of its subdivisions, from any person, firm or corporation for use in any public work and/or improvement, and, by the act of acquisition, oil, gas and/or other minerals or royalties are reserved, prescription shall not run

against such reservation of said oil, gas and/or other minerals or royalties."

That Act was repealed by Act 315 of 1940, LSA-R.S. 9:5806, which provides:

> * * * That when land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies, from any person, firm or corporation, and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

The ownership of the mineral right depends upon whether the mineral reservation provided for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes.

The first suit was filed in a Louisiana state court on August 13, 1953 by Leiter, against California and Allen L. Lobrano. The United States then filed in the federal district court the present action to quiet title, asserting its right to the minerals. The district court granted a preliminary injunction enjoining Leiter from prosecuting the state court action.[1] This Court affirmed.[2] On certiorari, the Su-

[1] Opinion reported as United States v. Leiter Minerals, Inc., E.D.La. 1954, 127 F.Supp. 439.

[2] Leiter Minerals, Inc. v. United States, 5 Cir. 1955, 224 F. 2d 381.

preme Court modified the judgment of this Court to permit an interpretation of the Louisiana statute involved to be sought with every expedition in the Louisiana courts, saying:

> "The Government contends that Act No. 315 of 1940 does not apply when the parties themselves have contracted for a reservation of specific duration and that if the statute is construed to apply to this situation, it would impair the obligation of the Government's contract. Petitioner disagrees. The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation, La.Rev.Stat., 1950, 13:4231 et seq.; and the United States of course may appear to urge its interpretation of the statute. See Stanley v. Schwalby, 147 U.S. 508, 512-513 [13 S.Ct. 418,

37 L.Ed. 259]. It need hardly be added that the state courts in such a proceeding can decide definitively only questions of state law that are not subject to overriding federal law.

"We therefore modify the judgment of the Court of Appeals to permit an interpretation of the state statute to be sought with every expedition in the state court in conformity with this opinion."

Leiter Minerals, Inc. v. United States, 1957, 352 U.S. 220, 229, 230, 77 S.Ct. 287, 292, 293, 1 L.Ed.2d 267. The Louisiana court rendered three published opinions, the last of which is presently of most importance.[3] The Supreme Court of Louisiana summarized its advice to the federal courts as follows:

"To summarize in conclusion, it is our view, and we hold: First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as not establishing a servitude for a fixed, definite and certain time, and if it is decided that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional. The interpretation of the contract is for the United States courts."

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[3] Leiter Minerals, Inc. v. California Co., 1960, 239 La. 116, 118 So.2d 124; Leiter Minerals, Inc. v. California Co., Ct.App. La. 4th Cir., 1961, 126 So.2d 76; Leiter Minerals, Inc. v. California Co., La. 1961, 241 La. 915, 132 So.2d 845.

Leiter Minerals, Inc. v. California Co., La.1961, 241 La. 915, 132 So.2d 845, 854, 855.

The federal district court then granted summary judgment in favor of the United States.[4] This appeal is from that judgment.

The United States argues that the deed is explicit that under the admitted circumstances the right was "to expire" and "the right to mine shall terminate, and complete fee in the land become vested in the United States"; that such a contract is valid under federal law; and that the rights of the United States under the deed are governed by federal law, citing Clearfield Trust Co. v. United States, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; United States v. Allegheny County, 1944, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209; Ivanhoe Irr. Dist. v. McCracken, 1958, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313; Girard Trust Co. v. United States, 3 Cir. 1945, 149 F.2d 872, 874; Whitin Machine Works v. United States, 1 Cir. 1949, 175 F.2d 504, 507; United States v. Jones, 9 Cir. 1949, 176 F.2d 278, 281.

The land was acquired by the United States in order to establish the "Delta Migratory Waterfowl Refuge," pursuant to the authority of the Migratory Bird Conservation Act, 16 U.S.C.A. § 703 et seq. Sections 715d and 715e authorize the Secretary of the Interior (1) to purchase or rent appropriate areas for migratory bird sanctuaries; (2) to do all things necessary to make such acquisitions; and provide, (3) that no such acquisitions by the United States shall "be defeated because of rights-of-way, easements, and reservations which * * * will in the opinion of the Secretary * * in no manner interfere with

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[4] United States v. Leiter Minerals, Inc., E.D.La. 1962, 204 F.Supp. 560.

the use of the areas so encumbered"; and (4) that such rights-of-way, easements, and reservations shall be subject to such regulations as the Secretary shall prescribe, and "it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease," or if deemed necessary by the Secretary to such rules and regulations as may be prescribed by him.

In addition, section 715f of the Migratory Act reads:

> "No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title *unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.*" (Emphasis added.)

We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable. United States v. Certain Property, etc., 2 Cir. 1962, 306 F.2d 439, 444, 445.

In effect, that is the teaching of the rules of decision act.[5] While this is not a diversity case con-

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[5] "§ 1652. *State laws as rules of decision*

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C.A. § 1652.

trolled by the Erie doctrine (Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188), the rules of decision act always has had "application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character." Swift v. Tyson, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L.Ed. 865. As to such matters, in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available. In the classical language of Mr. Justice Cardozo, speaking for the Supreme Court in Hawks v. Hamill, 1933, 288 U.S. 52, 59, 60, 53 S.Ct. 240, 242, 77 L.Ed. 610:

> "At least it is a considered dictum, and not comment merely *obiter*. It has capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement. * * * In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot."

On "* * * questions of state law that are not subject to overriding federal law * * *" (352 U.S. 230, 77 S.Ct. 293, 1 L.Ed.2d 267), the opinions of the Louisiana state courts, rendered in response to the suggestion of the Supreme Court (352 U.S. 229,

230, 77 S.Ct. 287, 1 L.Ed.2d 267) are all highly instructive, and the opinion of the State Supreme Court is controlling.

The State district court, Judge Bruce Nunez, entered judgment in favor of Leiter pursuant to an opinion which was adopted by Supreme Court Justice Hamlin as his dissent and is published in 132 So.2d at pp. 856-860. In part, Judge Nunez said:

> " 'In 1938, when Leiter sold to the government and reserved the mineral rights, the government had no assurance that the mineral rights would not be forever preserved to the vendor. The government's right to become thereafter vested with the ownership of the minerals, depended entirely on the uncertain future. The contract contained specific provisions which would have permitted Leiter to maintain his mineral rights forever, or at least indefinitely. It is this Court's considered opinion that what the parties did in 1938 was to establish, in a mode not prohibited by law or public policy, a conventional or contractual prescription as to the mineral rights and when the Legislature passed Act 315 a year and a half later, those mineral rights were still in effect. Likewise, at the time the Legislature passed the 1940 Act the government's rights to the minerals were just as contingent and uncertain as they were when Leiter executed the deed in 1938." (132 So.2d at p. 859.)

The State Court of Appeals took a diametrically opposite view, and "declared and decreed that Act 315 of 1940 (LSA-R.S. 9:5806) does not apply in this case since the mineral reservation is of specific ex contractu duration, less than the prevailing statutory period of ten years for non-user." (126 So.2d at 82.)

Mr. Justice Hawthorne, speaking for the majority of the Supreme Court of Louisiana, thought that both the Louisiana district court and the Louisiana Court of Appeals went too far, and that they should have confined their opinions to an interpretation of the Louisiana statute:

> "As we view the matter, both the Louisiana district court and the Louisiana Court of Appeal went far beyond the directive of the United States Supreme Court, as our state courts were not asked to interpret or construe the reservation of the mineral rights in the deed to the United States." (132 So.2d at p. 850.)

It nonetheless seems clear that the majority of the Supreme Court of Louisiana held the opinion that when the entire reservation was read together and in context, Leiter's servitude was one of indefinite duration. It disagreed flatly with the opinion of the Louisiana Court of Appeals and, continuing the paragraph of its opinion last quoted, said:

> "In this connection, however, we cannot help but observe that the Court of Appeal in reaching its conclusion did not consider the entire reservation but concentrated its whole attention on a single date in it. In this it was in error, for under Article 1955 of our Civil Code 'All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act'. For this reason the decision of the Court of Appeal on this point should not be given any weight." (132 So.2d at p. 850.)

In another part of its opinion, the Supreme Court of Louisiana said:

> "An example of a servitude established for a certain time (a servitude of specific duration) is that created by the mineral reservation in the case of Hodges v. Norton, 200 La. 614, 8 So.2d 618. Counsel for the government's lessees argue that the mineral reservation in that case is similar to the reservation in the Leiter deed. For what it may be worth, our opinion is that it is not." (132 So.2d at p. 852.)

We agree that, since the United States had the right to invoke federal jurisdiction (28 U.S.C.A. § 1345), the ultimate responsibility for the interpretation of the reservation rests upon the federal courts. That interpretation, however, must be in accordance with State law; and the opinions of the State courts, and especially of the State Supreme Court, are entitled to the most earnest and respectful consideration. While the State Supreme Court undertook to confine its opinion to the interpretation of the State statute, it was proper and inevitable that it do so "in light of" the reservation to which that statute might apply. See England v. Louisiana State Board of Medical Examiners, et al., 1964, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440.

After careful consideration, we find ourselves in full agreement with the Supreme Court of Louisiana. The federal district court observed that: "'Contractual prescription' is, at best, an odd notion." (204 F. Supp. 567.) The notion, however, appears to us consistent with the concept of a private law between the parties embodied in the provisions of the LSA-Civil Code that, "agreements legally entered into have the effect of laws on those who have formed them," Article 1901; and again, "legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them," Article 1945. That

last expression is, of course, not intended to deny any power of the Louisiana Legislature to render an agreement inoperative, for in this case the Louisiana Supreme Court has advised as to Act 315 of 1940 that:

> "The act draws no distinction between statutory and contractual prescription, and, as we view the matter from the history of the act and the objects and purposes for which it was adopted, it is manifest that the Legislature intended the act to be applicable to prescription whether established by statute or by contract where prescription had not already accrued at the time the act became effective." (132 So.2d at p. 854.)

The Louisiana Supreme Court cites as kinds of servitude which may not be affected by prescription, those which meet the tests of Article 821,[6] or of Article 783(6)[7] of the Civil Code of Louisiana (132 So.2d at 852).

Whether the parties stipulated for a period of contractual prescription must be determined from their viewpoint as of the time they entered into the contract. That is shown by the words "have been established" in Civil Code Article 821, note 6, supra, and is recognized in the Louisiana Supreme Court's sum-

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[6] "Art. 821. Servitudes are also extinguished when they have been established for a certain time only, or under a condition that in a certain event they shall cease; for when the time expires, or the event takes place, the servitude becomes extinguished of right." 3 LSA-C.C. Title 4.

[7] "Art. 783. Servitudes are extinguished:

"* * *

"6. By the expiration of the time for which the servitude was granted, or by the happening of the dissolving condition attached to the servitude." 3 LSA-C.C. Title 4.

mary of its holdings which we have quoted, and at other places in the opinion of the Louisiana Supreme Court, e. g.:

> "Where mineral rights in lands sold to the United States government are reserved for a certain, definite, and fixed time in the contract, or, in other words, where the servitude has been established for a certain or fixed time, at the expiration of the time fixed the servitude is lost or extinguished; and since in such a case there is no question of prescription, Act 315 of 1940 is without application." (132 So.2d at p. 853.)

Under that language, it seems clear that "a certain time only" as used in Article 821 means "a certain definite and fixed time." Louisiana Civil Code, Articles 2048 and 2049 make it equally clear that "certain event" means an event which in the course of nature is certain to occur.

> "Art. 2048. The time given or limited for the performance of an obligation, is called its *term*."
>
> "Art. 2049. A term may not only consist of a determinate lapse of time, but also of an event, provided that event be in the course of nature, certain; if it be uncertain, it forms a condition."

The first paragraph of the reservation provided: "* * * the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945 * * *."

But for the words "subject to the conditions hereinafter set forth" the servitude would have been established "for a certain time only." The first condition was expressed in the next paragraph, as follows:

> "* * * if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit: April 1, 1945."

It seems to us inescapable that that condition made the period for which the servitude was established indefinite and uncertain. At the time the parties entered into the contract it could not be known whether that condition would be met. The event was not "in the course of nature, certain".[8]

Successive conditions, likewise indefinite and uncertain, are provided in the succeeding paragraph:

> "* * * said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period * * *."

At the time the servitude was established, it might extend, according to the contract, for 10 years, 15 years, 20 years or until the minerals were exhausted. The district court properly commented that "[t]he Louisiana Supreme Court itself has told us that an 'uncertain and indefinite duration' is the hallmark of

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[8] Art. 2049 of LSA-Civil Code.

prescription," and continued, "Here the hallmark is missing." (204 F.Supp. at p. 567.) We cannot agree, but think that here the hallmark is inescapably present.

The district court pointed out many ways in which the "periods of reservation" differed from statutory prescription:

> "* * * There are other essential differences between the effect of these provisions and the rules of liberative prescription. These may be summarized:
>
> "First, under the present contract, *a large area will be released* from the servitude after the expiration of ten years *regardless of use or production*, for only 25 acres around each well are saved in any event.
>
> "Second, no use of the servitude short of *actual production in paying quantities for at least fifty days a year for three years* will preserve any part of the servitude beyond the primary term.
>
> "Third, only production in the *last three years* of the primary term will renew the servitude.
>
> "Fourth, even the requisite production at the right time will renew the servitude for *only five additional years.*
>
> "These are not the characteristics of legal prescription, nor of any known contractual variant." (204 F.Supp. at pp. 566, 567.)

There would be no need to recognize contractual prescription if it had to conform to statutory prescription. Art. 1764 of the LSA-Civil Code provides, in part, that, "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts * * *." Thus, Louisiana provides for the utmost liberty to contract. We can

see no reason why the contracting parties were not at liberty to prescribe the type of user which will overcome the presumption of abandonment and to require that it be a successful user. See Keebler v. Seubert, 1929, 167 La. 901, 120 So. 591, 592. We conclude that the district court erred in holding that the reservation in the deed did not provide for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes.

Appellees insist, however, that if the Louisiana statutes are so applied they would be unconstitutional because they would impair the obligations of the contract. Article I, Section 10 of the Constitution provides that, "No state shall * * * pass any * * * law impairing the obligation of contracts." The Constitution of Louisiana contains a similar provision, as to which the Supreme Court of Louisiana held: "Act 315 of 1940 does not violate Article 4, Section 15, of the Louisiana Constitution of 1921, which provides that vested rights shall not be divested and that no law impairing the obligation of contracts shall be passed." (132 So.2d at p. 854.) The reasoning upon which that holding was based seems to us sound and to apply with equal force to the like provision of the Constitution of the United States. That discussion, together with the full discussion of the constitutionality of Act 315 of 1940 contained in this Court's opinion in United States v. Nebo Oil Co., 5 Cir. 1951, 190 F.2d 1003, 1009, 1010, make it unnecessary further to labor the constitutional question.

That is even more clear when we consider that the contract may not have become legally binding until it was ratified and adopted by Thomas Leiter on October 24, 1938, after Act No. 151 of 1938 had been passed. Theretofore the contract of March 14, 1935 had been executed only by the executors and

trustees under the will of Joseph Leiter without any court authority, and though a space was provided for the execution of the agreement on behalf of the United States by the Secretary of Agriculture, it had never been so executed. Thomas Leiter's ratification recites that, "* * * on June 27, 1935, the United States of America mailed a notice of acceptance 'of the aforesaid offer to Mr. C. J. Tessier, 217 Carondelet Street, New Orleans, Louisiana, accepting the option above described on the terms and provisions stipulated therein' * * *." Mr. Tessier's authority or connection with the title does not otherwise appear from the record. It does appear, however, that on October 18, 1935 the Executors and Trustees under the will of Joseph Leiter executed a grant of preliminary use and occupation "in order that the United States may immediately establish the Delta Migratory Waterfowl Refuge by Executive Order." Under that permission, the United States entered into possession in 1936 and surveyed and mapped the area during the Winter of 1936-1937.

It is thus doubtful whether the contract became legally binding prior to the passage of Act No. 151 of 1938. Upon the assumption, however, that it became binding on its date, March 14, 1935, we hold there is no constitutional obstacle to the application of the Louisiana statutes—Act No. 151 of 1938 or Act No. 315 of 1940.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

GEWIN, Circuit Judge (dissenting).

After carefully considering the brilliant, clear and well-written opinion of the majority, I find myself

more in agreement with the opinion of the District Court [1] than with the majority opinion. Accordingly, I would adhere to the result and the conclusions reached by the District Court.

It appears to me that the majority opinion is not correct in holding that the mineral reservation provided for a contractual prescription for the *conditional* extinguishment of the mineral servitude which was rendered inoperative by the Louisiana statutes, which is to say, that there were conditions or a condition set forth in the contract which made the period for which the servitude was established indefinite and uncertain. The reservation was not of indefinite duration in my view, but was for a definite, fixed and specified time which elapsed on December 21, 1948,[2] before the Government executed its lease and before the discovery of oil.

The contract did not provide for a *conditional extinguishment*, but actually provided for a *conditional partial renewal*. The renewal conditions were not met during the initial 10 year period, and only the occurrence of those uncertain conditions would have renewed or extended the definite, fixed initial period of 10 years. The term of the servitude is definite. The right of renewal or extension is conditional and indefinite. In addition to the foregoing, as clearly pointed out by the District Court and noticed by the majority, a large area of the property would be released from the servitude inevitably, regardless of what took place.

I would affirm the judgment of the District Court.

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[1] United States v. Leiter Minerals, Inc. (D.C.E.D.La.1962) 204 F.Supp. 560.

[2] See note 26 of the District Court's opinion reported in 204 F.Supp. 560.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19963

D. C. Docket No. 4379 Civil

THE LEITER MINERALS, INC., APPELLANT

versus

UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and GEWIN, Circuit Judges, and SHEEHY, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

"Gewin, Circuit Judge, Dissents"

March 3, 1964

Issued as Mandate:

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19963

THE LEITER MINERALS, INC., APPELLANT,

versus

UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeal from the United States District Court
for the Eastern District of Louisiana.

(October 5, 1964)

ON PETITIONS FOR REHEARING

Before RIVES and GEWIN, Circuit Judges, and SHEEHY, District Judge PER CURIAM:

The motions of the appellees for en banc consideration of their petitions for rehearing have been considered by the members of the court or division to which the case was originally assigned. No Circuit Judge has initiated consideration of whether to order a rehearing en banc. In accordance with Fifth Circuit Rule 25(a), no formal order as to en banc rehearing is entered.

Careful consideration having been given to the petitions for rehearing, they are hereby

DENIED.

JUDGE GEWIN DISSENTS.

DEPARTMENT OF THE INTERIOR MEMORANDUM RELATIVE TO ACQUISITION OF LEITER LANDS

December 8, 1937

MEMORANDUM TO THE ADMINISTRATOR

PROJECT NAME: Delta Migratory Waterfowl Refuge
STATE AND NUMBER: Louisiana LB-LA 5 OPTION No. —— TRACT No. 6

OWNERSHIP: Joseph Leiter Estate FILE No. 501

IN THE OPINION OF THE UNDERSIGNED THE RESERVATION(S) CONTAINED IN THIS OFFER TO SELL HAVE BEEN ADEQUATELY CONSIDERED IN THE APPRAISAL VALUE OF THE TRACT AND WILL NOT IN ANY WAY ADVERSELY AFFECT THE PROPER DEVELOPMENT AND FUTURE ADMINISTRATION OF THE LAND WHICH IT COVERS AFTER THE LAND HAS BEEN ACQUIRED BY THE UNITED STATES. THE REASONS IN SUPPORT OF THESE OPINIONS ARE AS FOLLOWS:

The agreement for the purchase of this land contains a mineral reservation clause set out on pages 3 and 4 of that instrument, and attention is particularly called to it by reason of the unusual nature of the circumstances surrounding this proposed transaction.

The lands in question lie within a speculative oil field. Great importance attaches to the possibility of oil development and such speculative value is a potent factor in all considerations of the land owners looking to the conveyance of their title to these lands. The mineral reservation clause provides for the usual methods of oil exploitation in the event minerals are discovered, and contemplates the leasing of mineral rights to development companies. The universal prac-

tice is to grant leases for the development of mineral resources on the basis of a 1/8 royalty, but since it is possible that in the event oil is discovered the area recommended for acquisition as a waterfowl refuge might be seriously impaired through oil pollution, a recovery clause has been written into the mineral reservation whereby the United States will recover 5 % of the gross proceeds received by the vendors as royalties or otherwise from all oil or minerals so removed from, in, or under said lands, until such time as the vendors shall have paid to the United States of America the sum of $25,000, being the purchase price to be paid by the United States of America for said lands. In the event oil or other minerals are discovered on the lands, the United States could reasonably be expected to recover the investment made by it in the property in question. In the event oil is not discovered, the area will fully serve the property for which it is being acquired.

Field investigation disclosed that prospecting has been conducted on the area and no evidence of oil domes was disclosed. These reports indicate also that such prospecting has been over a protracted period and apparently thoroughly prosecuted. The premise, therefore, is that the reservation will expire within the time limitation of ten years, as set out in the reservation provisions.

This area is the only one suited for waterfowl refuge purposes in the region where it is located, and its acquisition is absolutely essential to a well rounded out refuge program, consequently there is no other place that will meet the requirements of the Bureau of Biological Survey. It is for this reason that the Bureau of Biological Survey has recommended the acquisition of these lands even in the face of the

mineral reservation encumbrance, without which concession the land cannot be acquired, but the Bureau of Biological Survey does feel that the interest of the Government is adequately protected through the recovery clause written into the reservation provisions.

It is respectfully requested that the Administrator approve the purchase of this tract of land subject to the above mentioned reservation provisions which are a part of the agreement for purchase of these lands.

Approved:

_____

Assistant Administrator
for the Administrator

/s/ B. M. Gile
B. M. Gile, Acting in Charge
Land Utilization, Region VI

Full Text of the Leiter Mineral Reservation

(R. 151-152)

The Vendor reserves from this sale the right to mine and remove, or to grant to others the right to mine and remove, all oil, gas and other valuable minerals which may be deposited in or under said lands, and to remove any oil, gas or other valuable minerals from the premises; the right to enter upon said lands at any time for the purpose of mining and removing said oil, gas and minerals, said right, subject to the conditions hereinafter set forth, to expire April 1, 1945, it being understood, however, that the vendors will pay to the United States of America, 5% of the gross proceeds received by them as royalties or otherwise from all oil or minerals so removed from in or under the aforedescribed lands, until such time as the vendors shall have paid to the United States of America, the sum of $25,000, being the purchase price paid by said United States of America for the aforedescribed properties.

Provided, that if at the termination of the ten (10) year period of reservation, it is found that such minerals, oil and gas are being operated and have been operated for an average of at least 50 days per year during the preceding three (3) year period to commercial advantage, then, and in that event, the said right to mine shall be extended for a further period of five (5) years, but that the right so extended shall be limited to an area of twenty-five acres of land around each well or mine producing, and each well or mine being drilled or developed at time of first extension, to-wit; April 1, 1945.

Provided, that this said right to mine as previously stated shall be further extended from time to time for periods of five (5) years whenever operation during the preceding five (5) year period has been for an average of 50 days per year during this period, and

Provided that at the termination of the ten (10) year period of reservation, if not extended, or at the termination of any extended period in case the operation has not been carried on for the number of days stated, the right to mine shall terminate, and complete fee in the land become vested in the United States.

The reservation of the oil and mineral rights herein made for the original period of ten (10) years and for any extended period or periods in accordance with the above provisions shall not be affected by any subsequent conveyance of all or any of the aforementioned properties by the United States of America, but said mineral rights shall, subject to the conditions above set forth, remain vested in the vendors.

DEPARTMENT OF THE INTERIOR MEMORANDUM RELATIVE TO OTHER SIMILAR MINERAL RESERVATIONS

[SEAL]

In reply refer to:
6.05b-ILM, 3120

May 11, 1964

UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT,
Washington 25, D.C., May 7, 1964.

Memorandum

To: Chief, Branch of Leasing, Division of Minerals

From: Chief, Division of Field Services

Subject: *The Leiter Minerals, Inc.* v. *United States,* No. 19963, in the U.S. Court of Appeals, Fifth Circuit

This responds to your memorandum of April 29 forwarding for our information a copy of the memorandum dated April 16 from the Associate Solicitor, Division of Public Lands, relating to the subject case. The Associate Solicitor requests that a review be made of all the acquired land leases in the State of Louisiana with the view of identifying those leases which embrace lands acquired by the United States subject to a mineral reservation similar to that in the Leiter case.

There are some 400 leases outstanding covering more than 300,000 acres of acquired lands in the State of Louisiana. Inasmuch as the acquired lands oil and gas leases (about 3500) are filed in serial order, active and inactive cases intermixed, we cannot readily separate the Louisiana leases to check on the mineral reservation, if any. We have advised

Mr. Frank Cotter of the Solicitor's staff, of our situation and at his suggestion have made a spot check of these leases.

On the basis of this spot check and our recollection of the land acquisition patterns in Louisiana, we would estimate that at least half of these lands were acquired subject to a mineral reservation identical or similar to the Leiter case, the difference being whether the initial reservation was for 10 years or 25 years.

Your copy of the Leiter decision of March 3, 1964 is returned herewith.

/s/ Julian V. Cox.

Attachment.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 765232 633